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Supreme Court of the United States

OCTOBER TERM, 1970.

No. 654

TIDEE PRODUCTS, INC.,

Petitioner,

and

NATIONAL LABOR RELATIONS BOARD,

vs.

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Respondent.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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APPENDIX A.

Statutes Involved

The following portions of the National Labor Relations Act., as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. Sec. 151, *et seq.*), are involved in this case:

Section 8(a):

"It shall be an unfair labor practice for an employer—

* * * * * *

"(5) to refuse to bargain collectively with the representatives of his employees. . . ."

Section 8(d):

"For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . ."

Section 10(c):

"The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaged in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. . . ."

APPENDIX B.

Decision and Order of the National Labor Relations Board dated February 24, 1969

DECISION AND ORDER.

On August 28, 1968, Trial Examiner Gordon J. Myatt issued his Decision in the above-entitled cases, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Union and the Respondent filed exceptions to the Trial Examiner's Decision and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with these cases to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed.

1. The Union has requested that the initials "CLC"" be included in the designation of its affiliation. In the absence of objections, we grant its request.

The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in these cases, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner,[2] as modified herein.[3]

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2. The Respondent filed a motion to reopen and consolidate these cases with Cases 9-CA-46148, 9-CA-46392, and 9-CA-47710. We have considered the Respondent's motion and, finding no merit therein, hereby deny it. As for the Respondent's contention of bias and prejudice on the part of the Trial Examiner, we have reviewed the record and find the contention without merit.

We find it unnecessary to pass upon the Charging Party's request that we make certain additional 8(a)(1) findings. Such findings, if made, would be cumulative in nature and would not affect the scope of our Order and Remedy herein because we have already provided a broad cease and desist order protecting all of the employees' Section 7 rights.

3. The capitalized second paragraph of the "Appendix" attached to the Trial Examiner's Decision and Recommended Order is hereby amended to read as follows: This notice is posted pursuant to an order of the National Labor Relations Board issued after a trial in which both sides had an opportunity to present evidence and arguments. The Board found that we violated the National Labor Relation Act and has ordered us to inform our employees of their rights.

ORDER.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, as modified herein, and orders that the Respondent Tiidee Products, Inc., Dayton, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as so modified.

Dated, Washington, D. C.

FRANK W. MCCULLOCH,
Chairman

GERALD A. BROWN,
Member

HOWARD JENKINS, JR.,
Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

Decision of National Labor Relations Board Trial Examiner dated August 28, 1968

STATEMENT OF THE CASE.

Gordon J. Myatt, Trial Examiner: In Case 9-CA-4440 the orginal charge was filed on September 21, 1967,[1] by International Union of Electrical, Radio & Machine Workers, AFL-CIO (hereinafter called the Union). Amended charges in this case were filed on September 22 and October 23, respectively. On November 14, Complaint and Notice of Hearing issued alleging that Tiidee Products, Inc. (hereinafter referred to as Respondent), had committed violations of Section 8(a)(1) and (3) of the Act by unlawfully interrogating employees about their activities on behalf of the Union, by threatening to cease operations if the Union became the employees' bargaining representative, by threatening to take reprisals against employees if the Union became their bargaining representative, by discriminatorily selecting employees for layoff, and by discriminatorily discharging employees because of their support of the Union.

In Case 9-CA-4488 the original charge was filed by the Union on October 23, and amended charges were filed on November 6 and 30. On December 14, Complaint and Notice of Hearing issued based on these charges alleging that the Respondent committed additional violations of Section 8(a)(1) and (3) of the Act. This complaint alleged that the Respondent discriminatorily changed terms and conditions of employment of employee-supporters of the Union, that the Respondent discriminatorily selected employees for layoff, and discriminatorily discharged an employee for engaging in activities on behalf of the Union.

On November 30, another charge was filed by the Union

1. All dates herein refer to 1967, unless otherwise indicated.

in Case 9-CA-4536, and on December 14, Complaint and Notice of Hearing issued. The Complaint alleged that the Respondent unlawfully refused to bargain with the Union as the certified representative of its employees in an appropriate unit. On December 22, the Union filed an additional charge in Case 9-CA-4563, and on December 29, Complaint and Notice of Hearing issued against the Respondent alleging further violations of Section 8(a)(1) and (3) of the Act. All of the above cases were consolidated for purposes of trial by an Order issued by the Regional Director for Region 9 on December 29. This matter was tried before me on January 16, 17, and 18, 1968, in Dayton, Ohio. All counsel and representatives were afforded full opportunity to be heard and to introduce relevant evidence. Briefs were submited by all of the parties, and they have been fully considered by me in arriving at my decision.

Upon the entire record in these proceedings, including my evaluation of the testimony of the witnesses based on my observation of their demeanor and on the relevant evidence, I make the following:

Findings of Fact.

I. Jurisdictional Findings.

The Respondent is an Ohio corporation engaged in the manufacture of metal and plastic parts for mobile homes and travel trailers and maintains its plant and principal place of business in Dayton, Ohio. During the past calendar year, the Respondent manufactured and shipped goods and products valued in excess of $50,000 directly from its plant in Dayton, Ohio to points located outside the State of Ohio. On the basis of the foregoing I find and conclude that the Respondent is an employer within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved.

International Union of Electrical, Radio & Machine Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices.

A. The Respondent's Refusal to Bargain.

The undisputed evidence shows that the Union commenced its organizing campaign in July. A petition was filed on August 1 and the parties entered into an Agreement for Consent Election on September 1.[2] The Agreement for Consent Election provided, in part:

> Secret Ballot.—An election by secret ballot shall be held under the supervision of the said Regional Director, among the employees of the undersigned Employer in the unit defined below, at the indicated time and place, to determine whether or not such employees desire to be represented for the purpose of collective bargaining. . . . Said election shall be held in accordance with the National Labor Relations Act, the Board's Rules and Regulations, and the applicable procedures and policies of the Board, provided that the determination of the Regional Director *shall be final and binding* upon any question, including questions as to the eligibility of voters, raised by any party hereto relating in any manner to the election, and provided further that rulings or determinations by the Regional Director in respect of any amendment of any certification resulting therefrom shall also be final. [Emphasis supplied.]
>
> * * * * *

2. The petition (Case 9-RC-7368), the Agreement for Consent Election, the Tally of Ballots, Respondent's Objections to the Election, and the Report on Objections and Certification of Representative are in evidence as General Counsel's Exhibits 1(hh) through 1(ii).

> 6. Objections, Challenges, Reports Thereon.—Objections to the conduct of the election or conduct affecting the results of the election, or to a determination of representatives based on the results thereof, may be filed with the Regional Director within 5 days after issuance of the Tally of Ballots. . . . The Regional Director shall investigate the matters contained in the objections and issue a report thereon. If objections are sustained, the Regional Director may in his report include an order voiding the results of the election and, in that event, shall be empowered to conduct a new election under the terms and provisions of this agreement at a date, time, and place to be determined by him. If the challenges are determinative of the results of the election, the Regional Director shall investigate the challenges and issue a report thereon. The method of investigation of objections and challenges, *including the question whether a hearing shall be held in connection therewith, shall be determined by the Regional Director, whose decision shall be final and binding.* [Emphasis supplied.]

The appropriate unit for purposes of collective bargaining was described as:

> All production and maintenance employees at the Employer's Dayton, Ohio, plant, excluding all office clerical employees, professional employees, technical employees, guards and supervisors as defined in the Act.

On September 14, a secret-ballot election was held which resulted in 19 votes for the Union, 6 against, and 3 challenged ballots.[3] The Respondent filed timely objections to the election, stating in essence: (1) that the Union distributed a leaflet to the employees on the day of the election "which specifically changed the election issues

3. The Tally of Ballots indicates that there were approximately 28 eligible voters in the unit.

established by [the] NLRB"; and (2) that the Union violated the Consent Agreement by challenging employees who were on the eligibility list. The Regional Director conducted an administrative investigation, and on the basis of his findings, issued a report overruling the Respondent's objections and certifying the Union as the exclusive bargaining representative of the employees.

On November 10, the Union's attorney directed a letter to Hollander, president of the Respondent, requesting certain information deemed necessary to enable the Union to engage in collective bargaining and requested that a meeting be arranged between the parties as soon as possible. On that same date the Union's attorney addressed a letter to the Respondent's labor consultant suggesting that the parties meet to commence negotiations for a collective-bargaining contract on November 15. Although the Respondent did not reply to either letter, two representatives from the Union, Reese and Brown, and two members from the employees' committee went to the Respondent's plant on November 15, for the purpose of commencing negotiations. Hollander refused to engage in collective bargaining and suggested that the union contingent contact his labor consultant. On November 20, the union president, Lacy, forwarded a letter to Respondent's labor consultant renewing the Union's request for negotiations and for the information previously sought. On November 22, the Respondent's labor consultant advised the Union's attorney in a letter that the Respondent would not comply with the certification issued by the Regional Director and that the Respondent considered that "the Regional Director acted arbitrarily and capriciously by denying the employer his right to due process." In this letter the labor consultant advised the Union that he would not meet with them "until all litigation is disposed of." The Union renewed its

request for negotiations in letters directed to the Respondent's representative on November 27 and December 18.[4]

Hollander was called as an adverse witness by the General Counsel and testified under Rule 43(b). Hollander admitted that he had not bargained with the Union and would not do so because the circulars passed out by the Union on the morning of the election violated, in his judgment, the Board's "24-hour" rule and gave the Union an unfair advantage. He also stated that he would not bargain while the charges were pending against the Respondent. It was also contended that the Regional Director denied the Respondent due process by making an administrative determination concerning the objections to the election rather than affording the Respondent the opportunity of a hearing.

The Respondent's assault on the validity of the Regional Director's certification of the Union as the exclusive bargaining representative of the employees is without merit. The objections were investigated and on the basis of the results of that investigation, a determination was made. Under the very terms of the Agreement for Consent Election the method of investigation, including the question of whether a hearing shall be held, was a matter which rested solely within the discretion of the Regional Director, and his decision in this regard was final and binding on the parties. It is well settled that a Regional Director's Decision in a consent-election situation will stand in the absence of evidence of "fraud, misconduct, or such gross mistakes as to imply bad faith." *Sumner Sand & Gravel Company*, 128 NLRB 1368, 1371, enfd. 293 F. 2d 754 (C. A. 9). Beyond the bald assertion that the Regional Director acted arbi-

4. The Union submitted a draft of a collective bargaining agreement and proposals covering pension, health, and life insurance benefits. The Respondent made no reply to the Union's proposals.

trarily and capriciously, the Respondent has failed to come forth with any evidence whatsoever that would even suggest that the Regional Director's determination should be questioned. Nor does Respondent's claim that it was denied due process alter this conclusion. The Union freely acknowledged having engaged in the conduct which the Respondent cited as objectionable, and there was no factual issue in contention. The claim that a hearing as required under these circumstances is frivolous. "The Constitution protects procedural regularity, not as an end in itself, but as a means of defending substantive interests?" *Fay* v. *Douds*, 172 F. 2d 720, 725 (C. A. 2). As the Regional Director's Report on Objections clearly indicates, the Respondent's contentions were thoroughly presented during the administrative investigation and considered in the Report itself. Thus it is evident that a hearing in these circumstances, where no factual dispute existed, would be nothing more than "a senseless and useless formality." *Air Control Products, Inc.* v. *N. L. R. B.*, 335 F. 2d 245, 249 (C. A. 5). See also *Carlisle Paper Box Company* v. *N. L. R. B.*, 68 LRRM 2831 (C. A. 3), decided July 17, 1968.

Accordingly, I find that the Regional Director's Certification of Representative is valid, and is final and binding on the Respondent. It follows, therefore, that the Respondent has engaged in and is engaging in conduct in violation of Section 8(a)(5) of the Act by refusing to bargain with the Union.

In addition to questioning the validity of the Certification, the Respondent's letter dated November 22, stated that it would not meet with the Union "until all litigation is disposed of." Pending Board proceedings or pending unfair labor practice charges do not relieve an employer of his statutory obligation to bargain with the collective-bargaining representative of his employees, and the refusal

to do so until the proceedings have been disposed of is clear evidence that the employer is seeking to avoid the obligations imposed by statute. In find therefore that the Respondent's refusal to meet with the Union until pending litigation is disposed of constitutes a separate violation of Section 8(a)(5) of the Act. *Greer Shop Note Company, a division of Kaynar Manufacturing Co., Inc.*, 162 NLRB No. 47; *Kit Manufacturing Company, Inc.*, 142 NLRB 957, 971.

I also find that the Respondent committed a further violation of Section 8(a)(5) of the Act by ignoring the Union's request for information pertaining to the employees. The information sought by the Union dealt with existing wages and fringe benefits, and the request for this data by the bargaining representative is presumptively lawful. *Weber Veneer & Plywood Company*, 161 NLRB 1054, 1056; *Curtiss-Wright Corporation, Wright Aeronautical Division*, 145 NLRB 152, enfd. 347 F. 2d 61 (C. A. 3). The Respondent offered nothing to rebut this presumption, but rather simply refused to deal with the Union in any manner. In these circumstances, the conclusion that the Respondent further violated Section 8(a)(5) is inescapable.

B. The Other Unlawful Conduct.

1. The events prior to the election.

The Union's efforts to organize the employees began in July. Employee Tackett contacted Reese, a representative of the Union, and arranged to have her meet with several of the Respondent's employees at Tackett's home. Shortly after this meeting Tackett and the employees who attended began to distribute authorization cards and solicit signatures from their fellow employees.

Later that same month, the Union intensified its organizational drive by handbilling the employees in front of the

Respondent's plant. The evidence indicates that this was the first time that the Respondent's officials became aware of the Union's efforts. A few days after the handbilling, Respondent's president, Hollander, told Donald Gearing[5] that he did not like unions and "if they got in, he would close the doors" and he and Gearing "would go fishing." According to Gearing, Hollander told him to listen around the plant for talk about the Union. Gearing testified that on another occasion in July, Hollander spoke to him about the Union and stated, "that if the Union got in, only the 'dedicated' employees would work and all of the rest [of the employees] would go." Hollander on the other hand categorically denied all statements attributed to him by Gearing, and testified that it was Gearing who came to him shortly after the handbilling incident and stated that he (Gearing) would quit if the plant became unionized.

Having observed these witnesses while testifying, and considering Hollander's intransigent and hostile attitude toward the very concept of union representation for the employees and his actions following the representation election, I credit the testimony of Gearing. Hollander's statements to Gearing were consistent with the course of conduct adopted by the Respondent in opposing the Union both during the organizing campaign and after the election.

Hollander also spoke to employee Haywood about the union activity in the plant. Haywood testified that Hollander told him in August that "if there is anything that you can find out [about the Union], I would appreciate it," and that "it would never be forgotten." According to Haywood, Hollander promised that he would be "taken care of," and that he (Haywood) had been in enough trouble and Hollander didn't want to see him get into any

5. Gearing is alleged by the General Counsel to be a supervisor. His status is treated, *infra*, in this Decision.

more.[6] Haywood testified that he later reported to Hollander that there were six employees on his side. According to Haywood, Hollander replied that he thought that the people on the assembly table were responsible for the trouble.

Hollander denied asking Haywood to ferret out information about the union activity among the employees. He stated that Haywood volunteered to do so, and he cautioned him to mind his own business. In view of my impression of Hollander, and considering his overall conduct in opposing the Union, I credit the testimony of Haywood.[7]

Employee Linton credibly testified that Melvin Hershey, also alleged to be a supervisor,[8] told him, shortly after the Union handbilled the plant, that the Respondent would not recognize a union and would close down and go fishing. During this conversation Hershey asked Linton if he knew anything about the Union. Linton testified that prior to the election, Hershey called him at home on the telephone and asked him "to talk up the Teamsters" among the employees, and to try to find out which of the employees would object to this Union.[9] Hershey, who appeared as a witness, denied discussing the Union with Linton, but did acknowledge that he was aware that Linton had formerly been a member of the Teamsters because the employee volunteered that information. On the basis of my obser-

6. Haywood apparently had served a prison term prior to working for the Respondent.

7. In addition to the request by Hollander, Haywood also testified that Gearing asked him to find out all that he could about the Union and report back. Haywood stated this request was made in July, and he refused to comply with it.

8. As this case of Gearing, the Respondent denied that Hershey was a supervisor. His status will likewise be determined subsequently in this Decision.

9. It is not clear in this record whether Hershey made this request during their initial conversation in July, or at some subsequent date.

vation of these witnesses, I find and conclude that Hershey did in fact make these statements to Linton.

On August 1, a meeting of approximately 12 of the female employees was held in Hollander's office. Gearing complained to Hollander about the women being off the floor because it was interfering with production. He was told not to worry about it as the employees were talking about the Union. When the meeting was concluded, Hollander came out of the office and told Gearing that the employees had voted 11 to 1 to get rid of him. Hollander informed Gearing that he "pushed them too hard" in their work and did not get along with people. Gearing subsequently gathered his tools and left the Respondent's plant.

On August 5, employee Tackett was injured in an automobile accident and remained home for approximately 5 weeks thereafter. During her convalescence Tackett acted in a liaison capacity between the employees and the Union. While at home Tackett received a visit from Hollander, who inquired as to how she was getting along and if she needed any financial assistance. Hollander gave Tackett $50 to help her along. According to Tackett, Hollander indicated that it was a "gift" from him, but that if she wanted to pay it back, she could do so at her leisure.

During the latter part of August, Mary Burgher, another alleged supervisor,[10] began to solicit signatures from the Respondent's employees on a petition which she was circulating in the plant. She was accompanied on this mission by Ward, another senior employee. The petition was actually a poll by which the employees were to indicate whether or not they wanted an election to determine if they should be represented by a union. In each case the employee was informed by Burgher to sign his or her name and indicate yes or no. Employees Linton, Wells, Virgil Brummitt,

10. Burgher's supervisory status is also in contention, and will be dealt with subsequently herein.

William Brummitt, and Graham signed the petition and placed "no" behind their names.[11] Several employees refused to sign the petition. These employees were Sawmiller, Morgan, Haywood, and Venters. Venters testified that when she refused to sign, Burgher told her that she had to do so. However, Venters remained adamant in her refusal. Employee Cash testified that when she was approached by Burgher, she indicated that she did not care one way or the other about the election and did not sign the petition. Another employee, Cullars, informed Burgher that she wanted more time to think the matter over. She was not approached thereafter by Burgher concerning the petition. Employee Reagan testified that Burgher signed her name to the petition and indicated "no" after her name. Reagan thought the matter over and subsequently went to Burgher and insisted that her name be erased. Employee Wilson signed the petition at the request of Burgher, but subsequently went to Burgher and asked that her name be stricken. According to Wilson, Burgher replied that she (Burgher) was proud to sign her name on the petition.[12] Tackett, at home convalescing while the poll was being taken, was contacted by telephone by Burgher and asked if she would sign the petition. Tackett was noncommittal in her reply and there is no indication that her name was attached to the petition.[13]

Although Hollander disclaimed any knowledge of the petition which Burgher had been circulating, the unrefuted

11. William Brummitt testified that he was told by Linton that Hershey wanted all employees in the plastics department to sign "no."

12. There is no indication in the record that Burgher ever deleted Wilson's name from the petition.

13. During this same conversation Burgher asked Tackett if she knew who among the employees started the union activity and what, if anything, she knew about the Union. In addition to remaining noncommittal about the petition, Tackett professed to know nothing about the Union.

evidence shows that Burgher took the petition into Hollander's office after she had secured the signatures. Burgher testified that she circulated the petition because employee Linton was talking about the Teamsters Union and the Charging Union had passed out literature informing employees that a Board election would be held at the plant. Burgher claimed that she conducted the survey to determine how the employees felt about the matter, and that she intended to give the petition to the Board.

After she had polled the employees, Burgher questioned a number of them individually about the Union. The unrefuted testimony shows that on August 31, Burgher asked employee Wells how he felt the Union's campaign was going. Burgher told Wells that she was going to vote against the Union. In another conversation with Wells shortly before September 14, Burgher told him that someone in the shop represented the union members and she wondered who it was. She asked Wells if he was the person, and when he denied it, Burgher stated that she was only "kidding."

During the week preceding the election on September 14, Burgher asked employee Reagan her views on the outcome of the election. This employee told Burgher that she was going to "kill Burgher's 'no' vote." During this same week Burgher approached employee Venters and asked her who was going to be the observer for the Union at the election. Burgher also asked this employee if she knew who started the Union. On the day of the election Burgher sought to get the name of the union observer from employee Wilson. When Wilson replied that she was going to be the observer, Burgher refused to believe her.

Burgher also played a minor role in conversations between Hollander and several employees. Sometime during

the latter part of August, employee Jones asked Burgher if she could see Hollander. After Burgher determined that it was possible, she accompanied Jones into Hollander's office. Jones was upset and threatened to quit her job because she was having difficulty with several of the employees in the plant. Hollander asked Jones if she knew who started "this." Jones replied that no one had said anything about the Union to her. Hollander then stated that he had not mentioned the word union, whereupon Jones replied, "No, you didn't, but I know what you mean." Hollander then turned to Burgher and said, "She'd be surprised if she knew, wouldn't she, Mary?" Burgher replied in the affirmative. Hollander then informed Jones that "We know a lot more than you think we know." Hollander assured Jones that matters would work out in the plant, and he asked her if she was aware of what had happened to Gearing. When Jones indicated that she had heard from the other employees that Gearing had been fired, Hollander stated, "We have our own way of taking care of troublemakers."[14]

A week before the election Burgher came to employee Cash's machine and instructed her to go to Hollander's office. Burgher followed Cash into the office. When they arrived, Hollander informed Cash that he had heard from Burgher that she was brooding over the fact that she had not been given a raise in pay. Hollander told Cash that he could not give her a raise while the matter with the Union was pending because it would look as if it were a bribe. Hollander promised her a 10-cent-an-hour increase once the "trouble" was over. As Cash was leaving Hollander's office he told her that the union people were a bunch of "damn Communists." Hollander also showed Cash some of his records indicating the amount of profit

14. Jones' version of this conversation was unrefuted in the record.

he was making on table legs which were being produced in the plant. Later that day, Hollander stopped by Cash's machine and asked her if she had learned anything from their conversation that morning. When Cash indicated that she had, he replied, "Well, some people think that grass is always greener on the other side, until they get there."[15]

2. The events after the election.

As previously noted, the election was held on September 14, and the Union received 19 votes with 6 votes cast against union representation and 3 ballots were challenged. Tackett was the employee observer for the Union during the election. After the Board agent announced the results to the assembled employees, Hollander grabbed Tackett's arm and said, "Do you mean . . . after all that I have done for you! I gave you $50 to save your house." Hollander then asked Tackett if she had anything to say to the employees and repeated this statement until Tackett then turned and announced the results of the election again.[16]

The following day when the employees reported to work, shortly after 7:30 a.m., they found the plant locked. A notice was posted on the door stating that the doors would not be opened until 7:45 a.m. Normally the doors to the plant were open when the employees arrived. When employees Tackett and Virgil Brummitt reported to the plastics department, thye were instructed by Hershey to grind up the 10-foot sections of hoses which the employees

15. Cash's testimony concerning her conversation with Hollander is not controverted in the record.

16. Hollander testified that the Board agent made his announcement in such a low tone that he was not certain that the employees heard the results. According to Hollander, he then asked Tackett to repeat the tally to the employees, and he denied grabbing her arm or expressing anger. I do not credit Hollander's version of this incident.

intended to prepare for shipment. Both Tackett and Brummit protested that the hoses were not defective and should not be destroyed.[17] Hershey, however, insisted that the hoses had to be scrapped.

After the hoses were destroyed, Hershey informed Tackett that he had no work available and sent her to Hollander. At approximately 10 a.m. Hollander laid Tackett off, citing lack of work as the reason. He instructed her to contact him by telephone the following Tuesday to determine whether there was work available. When Tackett called as instructed, she was told that the Respondent had no work for her. The following day Tackett again attempted to contact the Respondent, but Hollander refused to talk to her and instructed his secretary to inform Tackett that there was no work available. Tackett was recalled on September 25, and worked for appromixately a week. She was subsequently laid off again on September 29, because there was no work. The following week when Tackett went to the Respondent's office to pick up her paycheck, Hollander asked her to repay the $50 he had given her in August. When Tackett said that she thought it was a gift, Hollander indicated that it was once a gift, but that he did not consider it to be such now. He told Tackett that she was "an unappreciative employee."

Employee Virgil Brummitt was also laid off on September 15 at approximately 11 a.m. He was informed that there was no work available and he was instructed to remain in contact with the Respondent. Brummitt remained in layoff status for several weeks and was then recalled.

17. Tackett testified that the 10-foot sections were left from a run of hoses which were originally 25 feet in length. She stated that the Respondent had a request for 15-foot hoses and filled this order by cutting the desired length from the longer section of hoses. Tackett stated that the remaining sections could not be defective, and that they should have been prepared for shipment.

After working for approximately 7 days, Brummitt was laid off again and then recalled.

Employee Morgan was laid off on September 15 at approximately 3:30 p.m. because of lack of work. Morgan was polishing castings at the time of his layoff, and he testified that there was sufficient work to carry him through the following day. Morgan contacted the Respondent's office the following Tuesday and was told that there was still no work available. He was instructed to remain in contact with the Respondent. Morgan did not contact the Respondent for more than a month, and when he did, he was informed that there was only a single day's work available.[18]

The day after the election, the results were the topic of conversation around the Respondent's plant. The uncontroverted testimony indicates that Burgher approached employee Jones and asked her how she had voted in the election. Jones replied that she had voted "the right way." All of the employees testified that a sign was posted by the timeclock stating, "I know who." There was no signature attached to the bottom of the sign. Burgher testified that she put the sign up because someone had jammed the timeclock. According to Burgher, she wanted to indicate that she knew who was responsible. In view of the Respondent's continuous acts of harassment and retaliation against the employees after the election, I find Burgher's explanation entirely unpersuasive. I find, therefore, that the sign was posted to indicate that the Respondent's officials were aware of the identity of the employees who supported the Union.

On September 18, employee Reagan reported to work and was informed that she would not be allowed to work

18. Hollander testified that he had attempted to get in touch with Morgan during that month to recall him to work, but was unable to do so.

because of an oil leak in her machine. Hollander told Reagan that he would have to order a part for the machine. Reagan testified that in the past when her machine was broken, she was allowed to work on other machines or was given other duties in the plant. On September 20, Reagan was recalled and worked until her discharge the following day.[19]

On September 19, when employee Sawmiller reported to work she was informed by Hollander that her machine had broken down, and that she would be laid off until the machine was repaired.[20] Sawmiller contacted the Respondent the following day and was informed that her machine was still not repaired. She was not recalled to work until September 26. Sawmiller worked several days thereafter and then was laid off again due to lack of work. On October 6, Sawmiller returned to the plant to pick up her paycheck. Hollander noticed that she was not feeling well and suggested that she see a doctor. Later that day, Sawmiller called Hollander and informed him that she was 3 months pregnant and that she had complications with a kidney infection. Hollander told the employee to call him back when she was better. On October 31, Sawmiller called Hollander and was informed that it was the Respondent's policy not to allow pregnant women to work in the shop, therefore she was discharged.[21]

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19. The circumstances surrounding Reagan's discharge will be discussed later herein.

20. Sawmiller did not work on September 18, but testified that her machine was operating correctly the preceding Friday.

21. Hollander testified that the Respondent initiated this policy for the safety and benefit of female employees who became pregnant. Sawmiller and Venters credibly testified that at least two other female employees were allowed to work in the plant while they were pregnant. Venters stated that she overheard Burgher tell one of these employees that she could work until her 6th month of pregnancy, and that the employee wore maternity clothes while working in the plant.

On September 20, Hollander laid off employees Cash, Cullars, and Graham. In each instance lack of work was cited as the reason. Cash was laid off at noontime and the Respondent never recalled her. Cullars was recalled on September 25, and she was laid off several times thereafter. The record does not indicate when Graham was recalled, but this employee testified that she was recalled and laid off many times after September 20, and that each time she was laid off, she was informed that there was no work.

On September 20, Hollander came into the plant and accused employee Wilson of having one of the male employees unload a truck for her. Hollander told Wilson that if she wanted anything done she was to come to him or to Burgher. He concluded that conversation by telling Wilson "You better watch your step, and your mouth, too." At the end of the workday, Wilson was told by Hollander not to come to work the next day because there was none available. She was instructed to contact him the following Monday. Wilson testified that there was work available in the plant at the time of her layoff, and that she had been recalled and laid off several times after September 20 and that on each occasion there was work available in the plant.

On September 21, Ward came over to the machine that Reagan was operating and commented that it was "a shame the way the employees had done the Respondent." Reagan then accused Ward of being in favor of the Union, and this accusation so upset Ward that she spoke to Burgher about it. Burgher and Ward went into the Respondent's office and reported the incident to Hollander. Hollander came out of his office and motioned all of the employees over to Reagan's machine. According to Reagan, Hollander would not allow her to speak and accused her of having a big mouth and threatened to throw her out

of the plant. He had Ward repeat what Reagan said to her, and he then fired Reagan for talking about the Union while on the job. Venters, who was standing in the group of employees, testified that Hollander then turned to her and stated "that goes for you, too." According to Venters, Hollander then told her to "get [her] ass back to work and that [she] had raised enough hell and started enough rumors." Venters testified that Hollander stated, "You are making your bed and I will see that you pay for it." He then stated that he had been in "this mess before."

Hollander acknowledged that he fired Reagan because she was creating friction and she discussed the Union on the job. He admitted that he ordered Venters back to work, but denied swearing at her. Ward and another employee (Wilson) testified concerning this incident and gave a version substantially similar to that of Hollander. All witnesses agreed that Hollander fired Reagan because she was discussing the Union while on the job and that he ordered Venters back to work. The only area of conflict concerns the exact statements made by him while doing so. Considering the entire pattern of Hollander's conduct, both prior and subsequent to the election, and considering the prominent role that Ward played in unlawful poll of the employees in August, I am persuaded that Hollander made the statement attributed to him by Venters. Consequently, I credit her version of this incident.

On October 10, employee Jones was laid off because Hollander claimed that a shipment of cable was lost and he had no other work for her. Jones testified that in the past when she did not perform her usual duties, she was assigned work elsewhere in the plant.[22]

During the week of October 16, Jones and Venters were working at the assembly tables. Burghen instructed

22. Jones was also laid off on December 20 for a 3-day period.

Venters to operate a machine which fed parts to Jones for assembly. Shortly after Venters began running the machine, she discovered that she was catching up with Jones and that they were failing to assemble the required parts. Because of this Venters returned to the assembly table and began working with Jones on her own initiative. Burgher questioned this and called Hollander out into the plant. When the employees explained the difficulty, Hollander told them that he would allow the employees to work together at the table provided they produced 125 parts a day. In the past these employees jointly produced 75 parts each day. Several days later Hollander came into the plant and asked Jones and Venters if they were producing the 125 parts that he insisted upon. The employees informed him that this was impossible and that they were only able to produce 100 parts. Hollander then demanded 125 parts "or else." On October 21, Venters left the Respondent's employment and never returned, although she had received several calls from Hollander asking her to do so.

Employee Linton testified concerning several conversations with Hershey and Hollander about the Union after the election. He stated that 2 or 3 weeks after the election Hershey told him that the names of the four instigators of the Union were "mud."[23] Linton further testified that in November Hershey asked him if he had said anything about the Union around the plant and he told Linton that his days were "numbered." After charges were filed by the Union, Linton received a letter from the Board agent requesting information to be used in the investigation of the charges. Linton called Hershey at his home and informed him of the letter. Hershey came to Linton's home and took the letter and subsequently invited Linton over

23. There was no indication as to who these instigators were considered to be.

to his home. Hershey told Linton that he wanted him to call the Regional Office of the Board and inform them that he was interested in the Union and wanted to find out what was going on. According to Linton, Hershey gave no explanation as to why he wanted Linton to do this. While Linton was at Hershey's home, Hollander came there and told the employee that he could not order him to make this call to the Regional Office, but that he would like for him to do it.[24]

Sometime in December employee Haywood was laid off for an alleged lack of work. On December 29, Haywood returned to the Respondent's office to pick up his paycheck. While there Hollander asked Haywood how he had voted in the election. Haywood replied that he had voted for the Union. Hollander then stated that he knew this but wanted to see what the employee would say.

During the period following the election and continuing through the first of the following year, the Respondent hired four new employees. Although the record is not absolutely clear on this point, it appears that two of the employees were hired sometime between October and December, and that they performed jobs that the employees in layoff status would have normally performed. The remaining two employees were hired sometime during the first part of 1968.

Concluding Findings.

The initial issue to be resolved in this case is the status of Gearing, Burgher, and Hershey. The Respondent takes the position that Gearing was never designated foreman and that he in fact usurped the title and authority of this position. The Respondent further claims that Burgher was the oldest and most experienced employee, completely

24. There is no indication in the record that Linton ever made such a call to the Regional Office.

familiar with Respondent's entire operation, and that she simply trained new employees when they initially reported to the job. With respect to Hershey, the Respondent alleges that this individual is the technical engineer in charge of design, cost, and tooling, and in addition is responsible for quality control. Respondent denies that Hershey possesses any supervisory authority whatsoever. The relevant facts, however, do not support the Respondent's position with respect to these three individuals.

Gearing credibly testified that he was originally hired as a maintenance man and that after a few weeks the Respondent placed him on salary ($10,000 per year) with the understanding that he would run the plant. Hollander admitted that Gearing was placed on salary, but states that this was done in order to allow Gearing to earn a fixed sum of money without working long hours of overtime each week.[25] Gearing testified that he had authority to give work to employees, to see that the production was maintained, and to transfer employees from one job assignment to another. His testimony in this regard was corroborated by employees Wells, Sawmiller, Reagan, Haywood, and Morgan. Each of these employees testified that Gearing had authority to grant them time off for emergency leave or for illness and that he responsibly directed their work. There is evidence in the record that Hollander not only considered Gearing the foreman, but also informed at least one employee that Gearing occupied this position. The unrefuted testimony of Haywood indicates that when he was hired, Hollander told him that he would take instructions from Scarpelli, the toolmaker, because the foreman (Gearing) was in the hospital. On

25. Hollander claimed that Gearing worked 60 to 80 hours a week. It is significant to note that while Hollander professed to be concerned about the long hours Gearing was working, he complained, while testifying, that Gearing was no longer willing to put in the extra hours after he became salaried.

the basis of the above, it is clear that Gearing had authority to responsibly direct the work of the employees, to change their job assignments, to grant them time off, and to require them to work overtime if needed. It is also clear that the employees regarded Gearing as their supervisor.[26] *Huberta Coal Co., Inc.*, 168 NLRB No. 22. On the basis of the above, I find and conclude that Gearing was the Respondent's foreman, and that he was a supervisor within the meaning of Section 2(11) of the Act. *Stratford Lithographers, Inc.*, 168 NLRB No. 65; *Newland Knitting Mills*, 165 NLRB No. 104.

Respondent's contention that Burgher was nothing more than a senior employee who acted in the capacity of the leadgirl, also lacks persuasive force. The evidence discloses that from October 1966 until May 1967, a portion of the Respondent's operation was housed in a temporary plant located a considerable distance from the main plant. This division in the operation was caused by a fire which destroyed a portion of the main plant. It is undisputed that Burgher was the only person in charge of the six or seven female employees who worked in the temporary building, and that Hollander only visited the temporary building for short periods of time during the workweek. The employees who worked under Burgher in the temporary building credibly testified that she had the authority to, and in fact did, grant them time off for emergency situations. Further, that she assigned them duties and saw to it that they were carried out. The evidence also indicates that when Gearing was fired Burgher assumed his duties and directed all of the employees in the plant with the exception of the employees in the plastics department.

26. The Respondent's claim that Gearing usurped the authority that he exercised in the plant is completely unpersuasive. From my observation of Hollander, I am of the firm belief that this employer would not have allowed anyone to assert any supervisory authority in the plant unless he specifically authorized it.

Several employees testified that they were told by Hollander at the time they were hired that they would take their instructions from Burgher. Moreover, it is abundantly clear that Burgher regularly transmitted information concerning employees' conduct to Hollander, and that on the basis of information supplied by Burgher that Hollander took action affecting the employees. Considering all of the above, I find and conclude that Burgher was a supervisor within the meaning of Section 2(11) of the Act. *Huberta Coal Co., Inc., supra; Newland Knitting Mills, supra.*

The evidence is equally as compelling concerning the supervisory status of Hershey. Hershey hired employee Linton and informed him at the time of hire what his rate of pay would be. Employees Linton, Tackett, Virgil and William Brummit credibly testified that Hershey gave them their job assignments, transferred them from one job to another, and granted them time off when they requested it. Accordingly, I find and conclude that Hershey was also a supervisor within the meaning of Section 2(11) of the Act.

Having determined that Gearing, Burgher, and Hershey were supervisors, it necessarily follows that the Respondent is responsible for the conduct and statements of these individuals. *Webb Tractor and Equipment Company*, 167 NLRB No. 46. This record is replete with instances of unlawful conduct engaged in by the three supervisors and by the Respondent's president, commencing shortly after the handbilling of the plant in July. Hollander's threat to close up the plant and go fishing if the Union became the bargaining representative was repeated by Gearing and Hershey to employees Haywood and Linton. This statement carried the clear threat that the employees would face a loss of employment due to plant closure if they selected the Union as their representative. There are

numerous instances of unlawful interrogation of employees by the supervisors concerning union activities in the plant. Gearing admitted questioning Sawmiller to determine who was responsible for causing the Union to organize the employees. Hershey made a similar attempt to get information concerning the Union from employee Linton. Burgher was particularly active in this regard, and repeatedly questioned employees in an effort to determine the identity of the union adherents and the extent of the union activity among the employees. That such conduct by supervisors interferes with, restrains, and coerces employees in the exercise of their statutory rights is too fundamental to warrant citation. I find, therefore, that the Respondent violated Section 8(a)(1) of the Act by the above conduct of its supervisors.

In addition to the above unlawful conduct, Burgher polled the employees in order to determine their views about union representation. This poll was conducted at a time when representation proceedings were pending before the Board, and it is clear that the poll was not for the purpose of determining whether or not the Respondent should recognize the Union as the majority representative of the employees. *Blue Flash Express, Inc.*, 109 NLRB 591, 593. Accordingly, I find and conclude that the Respondent committed a further violation of Section 8(a)(1) of the Act when Supervisor Burgher conducted an unlawful poll to determine the extent of employee support for the Union. *Han-Dee Spring & Mfg. Co., Inc.*, 132 NLRB 1542.

The Respondent also violated Section 8(a)(1) when Gearing and Hollander on separate occasions attempted to enlist the aid of employee Haywood to check with other employees and to find out whatever he could about the Union. It is plain that both Gearing and Hollander were

seeking to use this employee as an informer to ascertain the extent of the union activity among the employees. This effort on the part of the Respondent's president and foreman further violates Section 8(a)(1) of the Act, *Atlas Engine Works, Inc.*, 162 NLRB No. 61.

The Respondent's attempts to interfere with and thwart the union activity of its employees did not cease after the election established that a clear majority of the employees desired union representation. Indeed, the evidence discloses that after the election, the Respondent's unlawful activities intensified. The day following the election Tackett, the union observer during the election, was laid off at 10 a.m., and Virgil Brummitt was laid off an hour later. Morgan was laid off at 3:30 p.m. that same day. On September 18, Reagan was not allowed to work at all because of an alleged defect in her machine, and on September 19, Sawmiller was also informed that she could not work because her machine needed repairing. On September 20, Cash, Cullars and Graham were laid off.

Although the Respondent asserts an economic defense, the evidence overwhelmingly supports the General Counsel's claim that the layoffs were unlawfully motivated. After expressing strong displeasure over the results of the election in the presence of all the employees, Hollander began laying off employees the very next day. There was no prior indication that a work curtailment was contemplated. It is significant to note that Tackett was the first employee selected for layoff that morning. Of equal significance is the fact that the Respondent departed from the past practice of finding other jobs around the plant for the employees during slow periods, e.g., cleaning machinery, washing windows, and general maintenance work. Thus, it is apparent that Hollander was carrying out the threat voiced to Gearing when he stated, "that if the Union got in, he would keep the 'dedicated' employees and

get rid of the rest." While the record shows that only two employees were actually fired, it is clear from the Respondent's treatment of the employees after the election that Hollander was seeking to achieve his purpose by penalizing the employees for voting for the Union, thereby discouraging their membership in the Union.

Additional evidence of this unlawful motivation is contained in Hollander's statements to employees during the week following the election. He told employee Wilson "to watch her step and her mouth," and he stated to employee Venters that "you're making your bed and I'll see that you pay for it." He also told Venters that he had been in "this mess before."[27] Hollander continued his harassment of the employees by suddenly increasing the production quota of the employees working at the assembly table. He demanded that these employees, Jones and Venters, produce 125 parts a day, whereas he previously had been satisfied with little more than half that amount. This dramatic increase in the production requirements, after the election, is a further demonstration of Hollander's efforts to retaliate against the employees for selecting the Union as their bargaining representative.

It is in the totality of these circumstances that I find and conclude that the Respondent's claim of economic justification for the layoffs must be completely rejected. I further find that the motivating cause underlying the Respondent's conduct was the intense desire to retaliate against the employees for voting in favor of union representation and thereby discourage employee membership in the Union. *Battle Creek Steel Fabricating Company, Inc.*, 169 NLRB

27. As the General Counsel correctly pointed out in his brief, "this mess before" obviously referred to the Union's prior attempt to organize the employees in 1964. A complaint was issued in connection with that effort and was subsequently dismissed by the Trial Examiner. (TXD-378-65).

No. 125; *West Side Plymouth, Inc.*, 170 NLRB No. 98. The suddenness of the layoffs, the departure from the past practice of putting employees to work in other jobs when business was slack, the various statements made to employees after the election, and the imposition of oppressive production quotas are all factors which far outweigh the Respondent's claim of economic necessity in its treatment of the employees. Accordingly, I find that the Respondent violated Section 8(a)(3) and (1) of the Act by laying off employees and increasing the production quota of two employees for discriminatory reasons.

The discharges of Reagan and Sawmiller must also be considered as a part of the pattern of unlawful conduct directed at the employees by the Respondent. It is clear that Reagan was fired for discussing the Union on the job, but it is equally as clear that until this particular incident the Respondent never invoked or enforced a rule against discussions of the Union in the plant. Indeed, the evidence shows that the Respondent's president and supervisors repeatedly discussed the Union with employees while they were on the job, and that Burgher freely circulated among the employees while they were working in an effort to poll them about their union sympathies. The conversation between Ward and Reagan which precipitated the latter's discharge was in fact initiated by Ward, who was complaining about the fact that the majority of the employees voted in favor of the Union. Hollander summarily discharged Reagan without affording her an opportunity to explain or defend her conduct, and there is no evidence in this record that any other employee was ever discharged for discussing the Union while working. It is apparent, therefore, that the rule against discussing the Union while on the job, if it existed at all, was spontaneously invoked and discriminatorily enforced against Reagan. Consequently, her discharge was in violation of Section 8(a)(3)

and (1) of the Act. *Talon, Inc.*, 170 NLRB No. 42; *Clanbach, Inc. d/b/a Carousel*, 170 NLRB No. 35. Cf. *Rexall Chemical Company, a Division of Rexall Drug and Chemical Company*, 172 NLRB No. 147.

The Respondent's claim that Sawmiller was discharged because of a policy against allowing female employees, for purposes of safety, to work in the plant is likewise without merit. The credible evidence indicates that at least one other female employee was allowed to work until she was in her 6th month of pregnancy. Moreover, Hollander's comments to Sawmiller at the time that she was ill, due to her pregnancy, gave rise to the expectation that the employee would be allowed to return to work once her condition was better. There was no mention of the alleged company policy against allowing pregnant women to work in the plant. I find therefore that Hollander seized upon the fact of Sawmiller's pregnancy as a pretext to enable him to get rid of one more employee identified as a union supporter. I therefore find that by the discharge of Sawmiller, the Respondent further violated Section 8(a)(3) and (1) of the Act. *Jackson Packing Company*, 170 NLRB No. 153.

Conclusions of Law.

1. The Respondent, Tiidee Products, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Union of Electrical, Radio and Machine Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The above Union is the duly certified collective-bargaining representative of the Respondent's employees in the following appropriate unit:

All production and maintenance employees at the

Employer's Dayton, Ohio, plant, excluding all office clerical employees, professional employees, technical employees, guards and supervisors, as defined in the Act.

4. By unlawfully interrogating employees to determine the identity of union adherents and the extent of union activity in the plant, the Respondent interfered with, coerced, and restrained employees in the exercise of their statutory rights and violated Section 8(a)(1) of the Act.

5. By threatening to close the plant in the event that the Union became the employees' bargaining representative, and by threatening to get rid of employees who supported the Union, the Respondent interfered with, restrained, and coerced the employees and violated Section 8(a)(1) of the Act.

6. By seeking to induce employees to act as informers concerning the union activities of fellow employees, the Respondent further violated Section 8(a)(1) of the Act.

7. By conducting a poll of the employees in order to determine their sentiment for or against the Union, at a time when a representation proceeding was pending before the Board, the Respondent further violated Section 8(a)(1) of the Act.

8. By unlawfully laying off employees because a majority of the employees selected the Union as their collective-bargaining representative, the Respondent violated Section 8(a)(3) and (1) of the Act.

9. By discriminatorily discharging employees in order to retaliate against employees for selecting the Union as their collective-bargaining representative and in order to discourage membership in the Union, the Respondent violated Section 8(a)(3) and (1) of the Act.

10. By arbitrarily increasing production quotas of employees in order to retaliate against them for selecting the

Union as their collective-bargaining representative, the Respondent changed terms and conditions of employment of its employees in order to discourage membership in the Union and violated Section 8(a)(3) and (1) of the Act.

11. By refusing to bargain with the Union as the certified collective-bargaining representative of the employees in an appropriate unit, the Respondent violated Section 8(a)(5) and (1) of the Act.

12. By refusing to furnish the Union with information pertaining to employees' existing wage and fringe benefits, the Respondent also violated Section 8(a)(5) and (1) of the Act.

13. By refusing to meet and negotiate with the Union, as the duly certified representative of its employees, until all litigation was concluded, the Respondent further violated Section 8(a)(5) and (1) of the Act.

14. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy.

Having found that the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. As I have found that the Respondent discriminatorily laid off and discharged employees on various dates beginning September 15, 1967, I shall recommend that the Respondent recall all employees discriminatorily laid off and reinstate all employees discriminatorily discharged to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suf-

fered as a result of the discrimination against them. The sum payable to these employees shall equal the amount they would have earned from the date of their unlawful layoff or discharge, as the case may be, to the date of recall or the offer of reinstatement, less any net earnings during the said period. Backpay shall be computed on a quarterly basis in a manner consistent with the Board policy set forth in *F. W. Woolworth Company*, 90 NLRB 289, and interest thereon shall be computed in the manner set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716. In the case of employee Sawmiller, however, backpay shall not accrue from the 6th month of her pregnancy to the time that she would have normally been able to return to work after the termination of her pregnancy.

Because the Respondent has refused and continues to refuse to bargain with the Union as the duly certified collective-bargaining representative of its employees in the unit found appropriate, I shall further recommend that it cease and desist from refusing to bargain and, upon request, bargain in good faith with the Union. Further, that if an understanding is reached, embody such understanding in a signed agreement. In view of the nature of the Respondent's extensive unfair labor practices and because this conduct evinces a complete rejection of the collective-bargaining principle, I shall also recommend that the certification period be extended to begin on the day that the Respondent commences to bargain in good faith with the Union, upon request, as the certified bargaining representative. *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785; *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229, enfd. 328 F. 2d 600 (C. A. 5); *Excelsior Laundry*, 167 NLRB No. 64; *Monroe Manufacturing Company*, 167 NLRB No. 157.

In addition to the above, the Union seeks a far broader remedy. The Union requests that the Respondent make the

employees whole for wages and benefits which they might have received but for the Respondent's unlawful refusal to bargain, and that the Respondent be required to pay the Union the amount of dues and initiation fees it lost dating from 130 days after the Union was certified. The 130 days is predicated upon the testimony of high-ranking union officials that in their experience a contract containing a union-shop clause is generally executed within 100 days after certification. The Union's request for this type of an expanded remedy represents the views of a growing body of respectable authority who take the position that the Board's current policy and practices in remedying this type of unlawful refusal to bargain is neither adequate nor realistic. There is currently pending before the Board at the present time two cases in which such a request is being considered.[28] In each of these cases the Board has received oral argument on the question of an adequate remedy, but has not, as yet, rendered its decision. As the remedy requested in the instant cases involves both legal and policy questions which should be initially considered by the Board, I am not inclined to grant the remedy requested by the Union. In the course of the trial of these cases, I allowed the Union to develop fully in the record all evidence necessary to sustain its position on this issue and in the event that the Board does modify its policy in this regard, the Union's position is amply protected. Accordingly, I decline to require the Respondent to make the employees whole for wages and benefits that might have been negotiated but for the unfair labor practices, and I likewise decline to require the Respondent to pay the Union the amount of dues and initiation fees lost as a result of a failure to negotiate a collective-bargaining agreement. *Monroe Auto Equipment*

28. *Zinke's Foods*, Case 30-CA-372 (TXD-662-66, Trial Examiner Josephine Klein); *Ex-Cell-O Corp.*, Case 25-CA-2377 (TXD-80-67, Trial Examiner Osley Vose).

Company, Hartwell Division, 164 NLRB No. 144. Cf. *Excelsior Laundry, supra.*

Because of the nature and extent of the unfair labor practices found herein and because these violations manifest an attitude of hostility directed toward the very basic purposes of the Act, and further, in order to prevent the commission of other unfair labor practices by the Respondent, I shall recommend a broad cease-and-desist order. *Barnwell Garment Company, Inc.*, 163 NLRB No. 8; *N. L. R. B.* v. *Entwistle Mfg. Co.*, 120 F. 2d 532, 536 (C. A. 4).

Accordingly, upon the foregoing findings of fact and the conclusions of law and upon the entire record in this case, I recommend, pursuant to Section 10(c) of the Act, the following:

RECOMMENDED ORDER.

Respondent, Tiidee Products, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating employees to determine the identity of union supporters and the extent of union activity in the plant.

(b) Threatening to close the plant or to discharge employees who support the Union in the event that the Union became the collective-bargaining representative.

(c) Seeking to induce employees to act as informers in an effort to determine the extent of union activities of other employees in the plant.

(d) Unlawfully polling employees to determine whether or not they support the Union.

(e) Discriminatorily laying off employees because the majority of the employees selected the Union as their collective-bargaining representative.

(f) Discriminatorily discharging employees because the majority of the employees selected the Union as their bargaining representative and because the employees so laid off were supporters of the Union.

(g) Discriminatorily changing terms and conditions of employment in order to retaliate against employees for voting in favor of union representation, and to discourage membership in the Union.

(h) Refusing to bargain collectively with International Union of Electrical, Radio and Machine Workers, AFL-CIO, as the duly certified exclusive bargaining representative of its employees concerning wages, rates of pay, hours, and other terms and conditions of employment in the following appropriate unit:

> All production and maintenance employees at the Respondent's Dayton, Ohio, plant, excluding all office clerical employees, professional employees, technical employees, guards and supervisors as defined in the Act.

(i) Refusing to furnish the Union with requested information necessary to enable the Union to act fully in its capacity as the collective-bargaining representative of the employees in the above unit.

(j) Refusing to meet and negotiate with the Union, as the duly certified representative of the employees, until all pending litigation is finally disposed of.

(k) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act, as amended.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Upon request, bargain collectively with International Union of Electrical, Radio and Machine Workers, AFL-

CIO, as the duly certified collective-bargaining representative of its employees in the appropriate unit with respect to rates of pay, wages, hours of work, and other terms and conditions of employment, and embody in a signed agreement any understanding reached.

(b) Furnish the Union with the requested information pertaining to wage and fringe benefits currently received by the employees in the bargaining unit.

(c) Recall any employee currently in layoff status, found herein to have been discriminatorily laid off to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges previously enjoyed by them, and make them whole for any loss of pay suffered by reason of their discriminatory layoffs in the manner set forth in the section of this Decision entitled "The Remedy."

(d) Offer Wanda Reagan and Virginia Sawmiller immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them, in the manner set forth in the section of this Decision entitled "The Remedy."

(e) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Recommended Order.

(f) Notify the employees laid off, if any are presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military

Training and Service Act, as amended, after discharge from the Armed Forces.

(g) Post at its Dayton, Ohio, plant copies of the attached notice marked "Appendix."[29] Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by the Respondent's official representative, shall be posted immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director for Region 9, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.[30]

Dated at Washington, D. C.

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29. In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

30. In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 9, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

Appendix.

Notice to All Employees.

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

This Notice is Posted Pursuant to a Recommended Order of the Trial Examiner, Issued after a Trial in which both Sides had the Opportunity to Present Evidence. The Trial Examiner Found that we Violated the National Labor Relations Act and has Ordered us to Inform our Employees of their Rights.

The Act gives all employees these rights:

To organize themselves
To form, join, or help unions
To bargain as a group through a representative of their own choosing
To act together for collective bargaining or other mutual aid or protection
To refuse to do any and all of these things

We assure all of our employees that:

We Will Not do anything that interferes with these rights.

We Will Not threaten our employees with plant closure, or discharge, or with any other types of reprisals because they have selected International Union of Electrical, Radio and Machine Workers, AFL-CIO, as their exclusive bargaining representative.

We Will Not attempt to get employees to inform on the union activities and desires of their fellow employees.

We Will Not unlawfully interrogate employees concerning their union membership, activities, or desires, nor

will we unlawfully poll our employees in order to discover their sentiments about the Union.

WE WILL NOT lay off employees because they selected the Union as their collective-bargaining representative.

WE WILL NOT discharge employees because they selected the Union as their collective-bargaining representative.

WE WILL NOT discriminatorily change terms and conditions of employment because employees voted in favor of union representation, or in order to discourage membership in the Union.

WE WILL NOT refuse to bargain collectively with the above Union as the certified collective-bargaining representative of the employees in the following unit:

> All production and maintenance employees at our Dayton, Ohio, plant, excluding all office clerical employees, professional employees, technical employees, guards and supervisors as defined in the Act.

WE WILL NOT refuse to furnish the Union with information that will enable it to function as the bargaining representative of our employees in the above unit.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights under the Act.

WE WILL make whole Virginia Sawmiller and Wanda Reagan for any loss of earnings they may have suffered by reason of their discriminatory discharges.

WE WILL recall and make whole all employees who were discriminatorily laid off by us.

WE WILL notify any of our employees if currently in layoff status and if presently serving in the Armed Forces of the United States of their rights to full reinstatement upon application in accordance with the Selective Service

Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

WE WILL bargain collectively with the above Union as the duly certified collective-bargaining representative of our employees in the above unit and if an understanding is reached, we will sign a contract with the Union.

TIDEE PRODUCTS, INC.
(Employer)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Federal Office Building, Room 2407, 550 Main Street, Cincinnati, Ohio 45202, Telephone 684-3686.

Opinion of the United States Court of Appeals for the District of Columbia Circuit entered April 3, 1970

Before: LEVENTHAL, ROBINSON and MACKINNON, *Circuit Judges.*

LEVENTHAL, *Circuit Judge:* This case arises on the Union's petition to review, and on a Board application to enforce, an order of the National Labor Relations Board. In its decision and order, reported at 174 NLRB No. 103, the Board found that Tiidee Products, Inc. (the Company) violated subsections (1), (3) and (5) of § 8(a) of the National Labor Relations Act.[1] The Board entered an order forbidding interference with employees' section 7 rights, and requiring that employees unlawfully laid off or discharged be reinstated and made whole for loss of earnings. As to the 8(a)(5) violation, the Board ordered the Company to bargain collectively with the Union and to furnish information pertaining to wage and fringe benefits. The order also required the posting of an appropriate notice.

The Company concedes the 8(a)(5) violation and some

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1. These are the material provisions of § 8(a) of the Act, see 29 U. S. C. § 158(a):

§ 158. Unfair labor practices.

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title [section 7 of the Act];

. . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .

. . .

(5) to refuse to bargain collectively with the representatives of his employees. . . .

of the 8(a)(1) violations charged, but resists the findings and remedies dealing with the other alleged violations. The Union agrees with the Board's findings but complains that the remedies prescribed are inadequate. We grant the Board's application to enforce the order already entered. On the Union's petition seeking further relief we remand for further proceedings.

A. *The Violations of §§ 8(a)(1) and 8(a)(3)*

1. The Company manufactures metal and plastic parts for mobile homes and trailers. In July of 1967 the Union began to organize the Company's employees. From the very beginning of the drive the Company's president displayed clear antiunion animus, as Company's counsel conceded at oral argument. At the urging of the president certain of the older and more trusted employees began to question their fellow employees about union activity. One employee, possibly on her own initiative, "polled" the employees concerning sentiment toward the Union without any safeguards or assurances that they would not suffer reprisals for their answers. The president of the company made, and certain employees passed on to others, threats to close the plant. The trial examiner and the Board found that the employees who engaged in these activities were supervisory personnel within the meaning of the statute, and thus that the Company itself had violated section 8(a)(1) of the Act by coercive actions taken against its employees.

The only ground on which the Company seeks to avoid accountability for 8(a)(1) violations is that certain employees "were not supervisors and that their conduct cannot, therefore, be attributed to the Company." The evidence amply supports the Board's conclusion that em-

ployees Burgher, Gearing, and Hershey met the statutory standards of having the authority "in the interest of the Company" to "assign," "transfer," and "responsibly ... direct" employees."[2] It is the Board's function to determine those who as a practical matter fall within the statutory definition[3] of "supervisor." *NLRB* v. *Swift & Co.*, 292 F. 2d 561, 563 1st Cir. (1961). Its finding is not undercut by the testimony relied on by the Company that they are not called supervisors, certainly not the testimony of the Company's president, and for that matter not the testimony of the employees involved since this merely falls into the groove of the titles used by the president. What is decisive is what the employees do rather than what they are called, and the evidence of what they do (see note 2) fully supports the Board's judgment that as a practical matter they are supervisors.

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2. Mary Burgher directed the work of other employees who worked with her, gave them job assignments, transferred them from job to job when necessary, gave them time off, and occasionally reprimanded them for poor work. Other employees testified that the Company president indicated when they were hired that Burgher would be their boss.

Gearing was told by the Company's president that he would be in charge of employees at the main plant and would have several other responsibilities of a clearly supervisory nature. Though the other employees were paid little more than the minimum wage, Gearing had a salary of $10,000 a year.

Hershey, the third employee in question, directed the employees in the plastics department, assigning their work and transferring them as necessary, and hired at least one employee.

3. Section 2(11) of the Act, 29 U. S. C. 152(11), defines a supervisor as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

2. The election sought by the Union was held on September 14, 1967, and the Union won 19 to 6. On September 15, the Company began a series of temporary and permanent layoffs. As to certain employees production quotas were increased. The Board found that the layoffs, discharges and changes in production quotas were discriminatorily motivated. We conclude that these findings are supported by substantial evidence.[4]

The layoffs began immediately after the election, which had results the Company considered adverse. The Company defends its actions on the ground that there was no work

4. The pattern of conduct shown by evidence credited by the Board is set out in the Board's opinion already cited. We see no need for detail on this point. It suffices to note:

The day after the election instead of keeping the doors open so that workers could enter, as before, whenever they arrived in the morning, the Company began the practice of keeping the doors locked until 7:45 a.m. and made the early arrivals wait outside.

The same morning the Union's election observer was deprived of work of winding hoses for shipment because a supervisor said they were defective. Yet there were 10-foot sections left from 25-foot hoses after 15-foot sections had been cut—and shipped. She was laid off again—ostensibly for lack of work. When she came to pick up her check the Company's president asked her for $50 he had provided when she was convalescing from an auto accident. She said she thought this was a gift. His reply: "It was at one time, but it isn't now." He added that she was "a very unappreciative employee."

As to several employees there was no reason for layoff except "lack of work," and no substantiation of this at hearing. When one worker came to pick up his check the president asked how he voted, and he admitted he voted for the Union. Said the president: "I know you did. I just wanted to see what you would say about it."

As to two employees whose previous norm had been 75 parts per day, the quota was raised to 125. One of them complained that a quota beyond 110 was not possible. She was told to produce 125 "or, else." She had previously been told by the president: "You're making your bed, and I'll see that you pay for it." She worked to the end of the day and never returned to the plant.

for the employees involved. No substantiated business reasons were offered for the alleged lack of work or sudden change in amount of work available. There was substantial evidence that in particular cases the no-work claim was pure fabrication.

The Board's findings and orders with respect to post-election layoffs, discharges, and changes in production quotas are affirmed.

B. *The Remedy Appropriate for the Patent Violation of Section 8(a)(5); Failure of the Board To Provide Satisfactory Justification for Limiting Relief to Order To Cease from Further Violations.*

1. The September 14 election resulted from an election petition that the Union had filed with the Board the previous August 1. On September 1, the parties entered into the usual agreement providing that disputes would be settled by the regional director of the Board, and that his decisions would be final. Shortly after the Union's 19-to-6 victory, the Company contested the results of the election, on the basis of Union distribution of a certain leaflet on election morning and also on the basis of a claim that three of those who voted were not entitled to vote. The leaflet was mildly worded.[5] The regional director determined that it did not

5. The leaflet, entitled "Hold Everything!", said:

> Today is the day to vote for greater benefits. That is just exactly what a YES vote will mean. . . . Only you lose if you don't vote YES. You lose the right to have a say in your working conditions, you lose the right to have a say in how much money you make, you lose the right to have seniority, a pension plan, an insurance plan, improved vacations, more holidays, and above all, the right to gain individual dignity. Your future is at stake today. The only way to make sure you don't lose a profitable and sure future is by voting YES today. . . .

affect the validity of the election. He further determined that whatever the merits of the claim that three voting employees should not have voted, the Union's 19-to-6 majority mooted the issue.[6] Accordingly, he certified the Union as the exclusive bargaining representative of the Company's employees.

On November 10, the Union's attorney wrote to the Company's president asking that the Company meet with the Union to begin collective bargaining. He requested various kinds of information about the employees (names, wages, etc.), including any information that the Union "would need to bargain intelligently." Another letter was sent the same day to Harvey Rector, the Company's labor consultant, asking the Company to meet with the Union on November 15, or the earliest convenient date, to begin negotiations. No replies were received to either letter. On November 20, the Union's president wrote to Rector renewing his previous request for negotiations and information. Two days later Rector replied that the Company considered the Union's certification invalid because the Regional Director had "acted arbitrarily and capriciously" and denied the Company due process. Rector stated that he would not meet with the Union until all litigation was disposed of. Two later letters from the Union to the Company requesting bargaining and information were ignored.

2. The Company's refusal to bargain was a clear and flagrant violation of the law. Its objections to the election were patently frivolous, and violated the express terms of the Agreement for Consent Election, entered into with the

6. This ruling is manifestly sound. *See* Manning, Maxwell & Moore, Inc. v. NLRB, 324 F. 2d 857 (5th Cir. 1963). It was not seriously contested on appeal.

Union only thirteen days before the election, to abide by the decision of the regional director. The Company gave not a hint of support or explanation for its claim that the regional director acted "arbitrarily and capriciously."

The Union contends that the Board's use of its traditional "remedy"—a cease-and-desist order—for a case of such intransigence bountifully and improperly rewards the Company for its transgression, and cannot be maintained as a faithful performance of the Board's task "of devising remedies to effectuate the policies of the Act." *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953).

We conclude that the Union makes a substantial contention, and that the Board has not, on the record before us, provided a satisfactory justification for its order.

Section 10(c) of the Act, 29 U. S. C. § 160(c), requires the Board "to take such affirmative action . . . as will effectuate the policies of this subchapter."

The broad scope of the Board's function has been noted by the Supreme Court. An illuminating precedent is *Fibreboard Paper Prods. Corp.* v. *NLRB*, 379 U. S. 203 (1964), where the Supreme Court approved a Board order which awarded back pay on the basis of a contract no longer in effect. The Board determined, and the Court agreed, that the employer's unilateral action in subcontracting the work, which destroyed the jobs of his employees, violated his duty to bargain with the union. Though the contract was no longer in effect, the Board reinstated its terms. The Court upheld the Board's conclusion that this action "to insure meaningful bargaining" is well designed to promote the policies of the Act. As to the burden on the employer, the Court said, simply: "Nor is there evidence

which would justify disturbing the Board's conclusion that the order would not impose an undue or unfair burden on the Company." (379 U. S. at 216)

The "affirmative action" clause of § 10(c) is not a mere charter of authority that the Board has the option to exercise or ignore. It is, as the Court has recently stated, a "broad command." *NLRB* v. *Rutter-Rex Mfg. Co.*, ... U. S. ..... (Dec. 15, 1969) (slip opin. p. 4).

We cannot discern, and the Board has not explained, on what basis it could or did conclude that its order under review is designed "to insure meaningful bargaining." Counsel for the Board tells us that the prospective order to bargain entered in this case is what is conventionally entered by the Board. Assuming the general validity of a purely prospective type of order, the case of brazen refusal to bargain, in violation of solemn obligations, presents special considerations. While such remedy may provide some bargaining from the date of the order's enforcement, it operates in a real sense so as to be counterproductive, and actually to reward an employer's refusal to bargain during the critical period following a union's organization of his plant. The obligation of collective bargaining is the core of the Act, and the primary means fashioned by Congress for securing industrial peace, *NLRB* v. *American Natl. Ins. Co.*, 343 U. S. 395, 404 (1952). "*Enforcement* of the obligation to bargain collectively is crucial to the statutory scheme," *id.* at 402 (emphasis added). Yet a prospective-only doctrine means that an employer reaps from his violation of the law an avoidance of bargaining which he considers an economic benefit. Effective redress for a statutory wrong should both compensate the party wronged and withhold from the wrongdoer the

"fruits of its violation." *Montgomery Ward & Co.* v. *NLRB*, 330 F. 2d 889, 894 (6th Cir. 1965). "Effectuation of the Act's policies. . . . requires that the employees whose statutory rights were invaded by reason of the Respondent's unlawful . . . action, and who may have suffered losses in consequence thereof, be reimbursed for such losses until such time as the Respondent remedies its violation by doing what it should have done in the first place." *Winn-Dixie Stores, Inc.*, 147 NLRB 788, 792, *aff'd in pertinent part*, 361 F. 2d 512 (5th Cir. 1966).

Employee interest in a union can wane quickly as working conditions remain apparently unaffected by the union or collective bargaining. When the company is finally ordered to bargain with the union some years later, the union may find that it represents only a small fraction of the employees. *See* Ross, *Analysis of Administrative Process Under Taft-Hartley*, 1966 Labor Relations Yearbook 299, 302-03; Note, *An Assessment of the Proposed "Make-Whole" Remedy in Refusal-To-Bargain Cases*, 67 Mich. L. Rev. 374, 378 (1968). Thus the employer may reap a second benefit from his original refusal to comply with the law: he may continue to enjoy lower labor expenses after the order to bargain either because the union is gone or because it is too weak to bargain effectively.

Not only furtherance of national labor policy but also important considerations of judicial administration are involved. Simply put, the present posture of the Board encourages frivolous litigation not only before the Board, but in the reviewing courts. The case at hand is in point. The position of the Company is palpably without merit with respect to its refusal to bargain. Yet it profited through the delay that review entails: all during this litigation it has

not had to bargain collectively over wages or other financial aspects of employment.

The courts, then, are doubly concerned when Board inadequacies drain and divert judicial resources from the provision of justice to the crowded calendars and to meritorious litigants whose claims clamor for attention. The same considerations are presumably applicable at the administrative level.

There is a presumption that favors the Board, with its expertise, in its selection of remedies. *Fibreboard Paper Prods. Corp. v. NLRB, supra. See also Consolo v. FMC*, 383 U. S. 607 (1966). That presumption is given full effect when the Board makes a conscious selection of remedies to effectuate the Act, provided reasons for its conclusion are stated or may fairly be discerned. That is not the situation in the case before us. The Board's silence on a substantial question raised by the Union is not sanctified by the circumstance that it was being passive rather than affirmative. That indeed seems to be the misguided assumption of the Board—that it is not subject to disapprobation if it is only doing the same as it has done before. The Examiner declined to award further relief to the Union on the ground that no such step had yet been authorized by the Board. Whatever merit in administrative terms may attach to this course at the Examiner level can hardly be adduced as justification for the Board's announcement in its decision that it was continuing the order drafted by the Examiner for the reasons stated by him. This kind of circularity hardly sustains an agency's disposition of a serious question.

We are aware that some aspects of the matter were argued to the Board some time ago in cases still not de-

cided.[7] If it be assumed *pro tem* that there are considerations precluding development of a truly meaningful remedy in cases where the employer's failure to bargain rested on a debatable question, this would not preclude a meaningful remedy for a manifestly unjustifiable refusal to bargain like that involved in the case at bar.[8]

The Board's assumption seems to be that application of a uniform remedy stills all legal doubts. But it is as old in philosophy at least as Aristotle, and it is settled in the law as well,[9] that the application of an apparently uniform rule may in reality engender unfair discrimination when like measures are applied to unlike cases.

Nor must it be assumed that the grievances in the wake of abuses like those before us are solely those of the Union. There are grievances, too, that are felt by employers who have fulfilled their legal obligation to bargain, especially if they are competitors.

We would not cavil with the Board's course if it appeared that no further action could lawfully be taken by

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7. Ex-Cell-O Corp., Case No. 25-CA-2377 (trial examiner's decision rendered March 7, 1967); Herman Wilson Lumber Co., Case No. 26-CA-2536 (TXD rendered Jan. 4, 1967); Zinke's Foods, Inc., Case No. 30-CA-372 (TXD rendered Dec. 18, 1966).

8. St. Antoine, *A Touchstone for Labor Board Remedies*, 14 Wayne L. Rev., 1039, 1043 (1968).

The author also notes (see page 1042) that a make-whole order, being not only compensatory but also one that "can be shown to have a rational relation to the particular violation found" is not subject to interdiction as a purely "penal" remedy. The vitality of the "penal" objection is also undercut by the Supreme Court's recent decision in NLRB v. J. H. Rutter-Rex Mfg. Co., Inc., No. 32, Slip op. at 7 (Dec. 15, 1969): "But the Board could properly conclude that backpay is not only punishment for an unfair labor practice, but is also a remedy designed to restore, so far as possible, the status quo which would have obtained but for the wrongful act."

9. Green v. County School Bd. of New Kent Cty., 391 U. S. 430 (1968); Griffin v. Illinois, 351 U. S. 12 (1956); Eng v. Trinidad, 271 U. S. 500 (1926).

the Board. But we see no basis for such a claim. There may be difficulties in one of the proposals offered by the Union in this case: that the Company be ordered to pay dues, for the pay period "lost" to the employees by virtue of the Company's violation, to the union they selected as their agent. We are in no position to gainsay the possibility that an agency might reject the proposal for reasons of sound administrative policy. And any such proposals would have to be shaped to take into account legal considerations.[10]

But even if the Board declines to take the steps advocated by the Union, it may conclude that some other remedies will at least do something to advance the policies of the Act, and prevent the employer from having a free ride during the period of litigation.[11]

In reaching its conclusion on appropriate remedies and the extent to which it can base them on probable employer-employee relationships, the Board may properly take into account the doctrine of *NLRB* v. *Mooney Aircraft, Inc.*, 375 F. 2d 402 (5th Cir.), *cert. denied*, 389 U. S. 859 (1967), wherein enforcement was granted to the Board's back pay order at higher wages than the employee had been making prior to his discharge, because the Board had concluded that the employee probably would have been promoted.

A tribunal given the function of implementing national policy through compensatory remedies may not soundly refer to the difficulty in quantifying appropriate compensation as a justification for withdrawal and frustration of the

10. Since the dues and initiation fees would have come from the employees' pockets and not from the Company, any assessment of these charges against the Company would have to be subtracted from back pay awards. This would avoid the legal problem of a Board order awarding more than back pay.

11. Thus, other unions have recommended, for example, assessment of costs of litigation.

policy, particularly where such an approach would operate only to reward the wrongdoer and to give him an advantage over a law-abiding competitor. Pertinent doctrine was stated thus in *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251, 264-65 (1946):

> In such a case, even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. . . . Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrong-doing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.
>
> The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. . . . That principle is an ancient one, and is not restricted to proof of damage in antitrust suits, although their character is such as frequently to call for its application.

The Supreme Court has recently pointed out the propriety, within the national labor policy, of putting on the wrong-doing employer the burden of compensating employees for the loss suffered during a period of unusual Board delay, a delay that the employer might with reason have failed to contemplate.[12]

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12. *See* NLRB v. J. Rutter-Rex Mfg. Co., *supra*:

> Either the company or the employees had to bear the cost of the Board's delay. The Board placed that cost upon the company, which had wrongfully failed to reinstate the employees.

This principle has added force in a case, like the one before us, where the delay in conforming to the law was not unusual in extent, was of benefit to the Company from its viewpoint, and was in fact sought by the Company.

The power to accord some meaningful make-whole relief is not necessarily undercut by the provision in section 8(d) of the Act that the obligation to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession." In this case the refusal to bargain is clear and unmistakable, and there is not the slightest suggestion that a refusal to make a concession might be identified as a refusal to bargain collectively. The Board cannot be faulted on the ground that it is imposing contract terms upon an unwilling employer when it is engaged only in a determination of a means of calculating a remedy to compensate for injury sustained from an unfair (and unlawful) labor practice. This is not mere playing with words. We are in accord with the view of a careful student of this field of law who points out that no one would suggest that the award of damages in an antitrust suit would constitute the imposition of contract terms even if the calculation of reasonable and probable damages took into account a conclusion as to business opportunities denied, based on an appraisal of an agreement the parties probably would have realized but for the defendant's illegal acts. *See* St. Antoine, *A Touchstone for Labor Remedies*, 14 Wayne L. Rev. 1039, 1053 (1968). Let us consider a more homely analogy: Suppose an employer assaults and incapacitates someone who is working as a stock clerk while finishing engineering school. Certainly a court would not be debarred from considering evidence indicating that in due course the clerk would likely have been employed as an engineer merely because the employer was under no contract requirement to employ him on that basis. Similarly the make-whole remedy—which could be

measured not by any sentiment as to what the parties *should* have agreed to, but only by a determination, on the basis of all the evidence available, of what it is likely the parties *would* have agreed to—provides money compensation as a remedy for past wrongs. Combined with the traditional remedy, it imposes no present or future contract obligations, and operates as to the future not by assuring the employees any right to certain terms, but only by requiring for the future what could not be provided for the past, *i.e.*, collective bargaining as required by the law. This approach is not forbidden by section 8(d) of the Act.[13]

13. This conclusion is further supported by cases like *Fibreboard*, *supra*, and *Mooney Aircraft*, *supra*. In those cases the courts upheld a remedy which was permissible under section 10 even though the Board justified the reasonableness of the technique by noting that it was a continuation of an existing agreement that probably would have been entered into. The permissibility of the order under section 10 of the Act is not obviated by the employer's failure to include the pertinent provision in the terms of a pending agreement. Cf. NLRB v. Strong, 393 U. S. 357 (1969), holding that the prohibition against the Board's undertaking to enforce the provisions of a labor contract does not bar it from ordering back pay and fringe benefits agreed to by an employer in a contract he subsequently declined to sign, since the order was valid under section 10 as a remedy for an unfair labor practice.

As to various objections that a make-whole remedy is impractical, they rest either on the difficulty of assessing damages, a matter that is not controlling as our discussion above (pp. 13-15) indicates, or else relate to policy considerations that are for assessment by the Board in the first instance.

No serious objection may be lodged against the make-whole relief because it adds elements of novelty to the Board's lexicon of orders. In the pithy words of Judge, now Chief Justice Burger: "In the evolution of the law of remedies some things are bound to happen for the 'first time.'"[14]

14. International Bhd. of Operative Potters v. NLRB, 116 U. S. App. D. C. 35, 39, 320 F. 2d 757, 761 (1963). The opinion approves the award of interest as well as back pay, and overrides

We have given careful consideration to the recent decision in *H. K. Porter Co., Inc.* v. *NLRB*, ... U. S. ..... (38 U. S. L. W. 4177, March 2, 1970). In *Porter* the Supreme Court ruled that the Act puts a limitation on the permissible scope of a Board's order, even where the employer has in bad faith refused to bargain. The Court did not recede from, indeed it expressly reiterated, the principle that the "Board's remedial powers under § 10 of the Act are broad." But it held that they were not so broad as to override the specific provision and policy of the Act which forbids the Board from "compel[ling] agreement when the parties themselves are unable to do so." ..... U. S. at ..... We have had this principle firmly in mind throughout our consideration, and have not proceeded on the assumption that the case at bar might justify a qualification of that principle. We in no way suggest either that the Board can compel agreement or that the make-whole remedy is appropriate under circumstances in which the parties would have been unable to reach agreement by themselves. Quite the contrary, we have specifically limited the scope of our remand first, to consideration of past damages, not to compulsion of a future contract term, and second, to relate to damages based upon a determination of what the parties themselves would have agreed to if they had engaged in the kind of bargaining process required by the Act. It is not within the scope of our remand for the Board to measure the amount of damages by reference to any contract term which could have been brought about only through a mandate to the employer not merely to engage in the process of collective bargaining but also to agree on a contract provision.

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the objection that this has punitive aspects since the obligation is public, pointing out that the award of interest effectuates the Act as "plainly in the direction of making the employee whole." *Id.*

We reiterate that damages can be awarded on an assessment of the contract terms that would have been in effect if the law had been complied with even though the law-violating employer has not yet entered into the contract. *Fibreboard Paper Prods. Corp. v. NLRB, supra; NLRB v. Mooney Aircraft, Inc., supra.*

The Union has asked for remand to the Board for further consideration of the make-whole claim (while the remainder of the Board's order is enforced). We think this is sound. In view of the interest of judicial administration, including the impact on court dockets, we accompany our remand with a directive to make supplementary findings in the event the Board determines on remand that it should not grant any make-whole relief, in whole or in part. If the Board believes that alternative remedies,[15] beyond those already granted, are more appropriate, it should so state. The assessment of these matters is for the Board.

The Board's application for enforcement of the order as issued is granted. On the Union's petition for review, the case is remanded for further proceedings not inconsistent with this opinion.

So ordered.

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15. The scope of the Board's consideration on remand, if it is deemed that the Union's proposal goes too far, would include consideration of such lesser, alternative remedies as an award to the Union for excess organization costs caused by the Company's behavior, or for the costs of having to litigate a frivolous case, or for a combination of these.

MacKinnon, *Circuit Judge*, concurring in part and dissenting in part: The majority opinion remands the case involving the Union's petition for review for further proceedings by the Board to consider the Union's request of their so-called "make-whole claim." With respect to this Union request, the majority opinion says, "We think this is sound," but admits "There may be difficulties in one [only one?] of the proposals offered by the Union in this case: that the Company be ordered to pay [Union] dues for the pay period 'lost' to the employees by virtue of the Company's violation . . . ." (Slip op. 13). In evaluating what is involved in the remand ordered by the majority the entire Union request for so-called "remedial relief" must be considered.

The Trial Examiner refused to recommend the remedial relief requested by the Union and the Board affirmed his findings and recommendation by denying the Union's request in its entirety. The Union request for additional relief as set forth in its brief to this court follows:

> In support of its request for compensatory relief to maintain the *status quo ante* pending compliance by the Company of its duty to bargain collectively, the Union adduced competent and uncontested testimony (TDX 18; Tr. 494-497, 509-510) that a contract would have been consummated within seventy-five (75) to one hundred (100) days of the Union's November 8 certification (Tr. 498-500). A complete contract proposal (GC Exhs. 13 and 14) was submitted and received by the Company which requested an immediate wage increase of fifteen (15) cents per hour followed by a further wage increase of twenty (20) cents per hour as of February 1, 1968, when the minimum lawful rate of one dollar and sixty cents ($1.60) per hour became compulsory under the Fair Labor Standards Act. These wage increases would merely establish a rate of fifteen (15) cents per hour above the minimum statutory rate, a level of compensation considerably

below the prevailing area wages paid to comparable employees for similar work (C. P. Exhs. 1, 2, 3 and 4; Tr. 505-507).

In the foregoing premises the Union requested that minimal compensatory relief be computed and awarded by the Board, as follows:

1. that the Company pay at least fifteen (15) cents an hour to its employees as of such date a contract would have been executed.

2. that in addition to the rate established pursuant to '1' above, the Company pay its employees cost-of-living increases of one (1) cent per hour for each 0.4 increase in the Consumer's Price Index published by the United States Department of Labor (1957-1959 equal a base period of 100).

The Union also established that the prevailing contract practice in the area by employees comparable with the Company was to include a union security clause in such contracts that are negotiated (Tr. 498). In this premise, coupled with the nineteen (19) 'yes' votes that were recorded for the Union in the representation election, the Union requested the Board to direct the Company to pay the Union an amount equal to such dues and initiation fees that would have been realized beginning March 18, 1969, the date that a union security provision would have been in force and effect as part of a contract negotiated following the Union's certification. In computing such amount, the Union requested that said amount be established on a minimum basis of nineteen (19) employees and with such additional employees as are evidenced by written bargaining authorizations secured since the certification of the Union.

The Union's petition thus requests that an order issue requiring the Company to make payments to the Union and its employees based on the premise that a contract would have been consummated within 75 to 100 days of the Union's November 8th certification providing for pay

raises to all employees of 15¢ per hour plus a certain cost of living increase and including an amount as dues and initiation fees for 19 employees[1] that voted for the Union on the assumption that the contract would have been executed with a "union security clause" (checkoff), such dues and fees to begin on March 18, 1969.

At the outset I note that the adequacy of the Board's remedies in unfair labor practice cases is currently being debated. As the Trial Examiner in this case stated:

> The Union's request for this type of an expanded remedy represents the views of a growing body of respectable authority who take the position that the Board's current policy and practice in remedying this type of unlawful refusal to bargain is neither adequate nor realistic. There is currently pending before the Board at the present time two cases in which such a request is being considered (*Zinke's Foods*, Case 30-CA-372 and *El-Cello-O Corp.*, Case 25-CA-2377). In each of these cases the Board has received oral argument on the question of an adequate remedy, but has not, as yet, rendered its decision.

See also St. Antoine, *A Touchstone for Labor Remedies*, 14 WAYNE L. REV. 1039 (1968).

However, at least some of the questions that have been raised have recently been answered by the Supreme Court in *H. K. Porter Co.* v. *NLRB*, 38 U. S. L. W. 4177 (U. S. March 2, 1970). In that case, the Supreme Court reversed and remanded to this court an order of the NLRB issued after an opinion by a panel of this court required an employer to

> "[g]rant to the Union a contract clause providing for the checkoff of Union dues." 172 N. L. R. B. No. 72, *aff'd*, *H. K. Porter Co.* v. *N. L. R. B.*, ... U. S. App. D. C. ....., 414 F. 2d 1123 (1969).

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1. Plus any additional employees that might sign written bargaining authorizations.

The Court held that the Board was without power to "compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement." *H. K. Porter Co.* v. *NLRB*, *supra* at 4178. In reaching this decision, Justice Black reviewed the relevant legislative and judicial history of labor relations in this country. His historical analysis makes it clear "that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements. *NLRB* v. *American Ins. Co.*, 343 U. S. 395, 404 (1952)." *H. K. Porter Co.* v. *NLRB*, *supra* at 4179. See also *Cap Santa Vue, Inc.* v. *NLRB*, ... U. S. App. D. C. ....., ... F. 2d ..... (decided Jan. 20, 1970) where a similar conclusion based on this legislative and judicial history was reached.

In my opinion the history of the Act thus makes it clear that the policy behind the Act is to rely on collective bargaining and to avoid compulsory arbitration. Heretofore it had been generally considered that this was the position of labor and management. At labor's request, were we now to empower the Board to write labor contracts on wages and union security, the time may well come when labor would be dissatisfied with a governmental board exercising such power. The character of the Board is subject to constant change and considerable wisdom may have been exercised in restricting its power in the contractual area.

With these principles in mind, I turn to the instant case. The majority holds that "damages can be awarded on an assessment of the contract terms that would have been in effect if the law had been complied with even though the law-violating employer has not yet entered into the contract. . . ." *Fibreboard Paper Prods. Corp.* v. *NLRB*, 379 U. S. 203 (1964), and *NLRB* v. *Mooney Aircraft, Inc.*, 375 F. 2d 402 (5th Cir.), *cert. denied*, 389 U. S. 859 (1967), are

cited in support of this proposition. In the *Fibreboard* case, the unfair labor practice was the failure of the employer to negotiate with his employees the subcontracting out of certain work which had previously been performed by them. The effect of this unfair labor practice was to permit the employer to subcontract out the work in question without giving his employees a chance to negotiate the point. The Board ordered the original contract reinstated and the Court affirmed. It could be argued that no other remedy would have been adequate in the circumstances of the case. To reinstitute the contract was simply to put the parties back in the last legal position they occupied. The Court did not hold that the contract must continue after the parties negotiated and thus it did not attempt to dictate a substantive term of the contract. This case does not provide authority for the step the majority takes in the instant case.

In the *Mooney Aircraft* case, the Fifth Circuit upheld a backpay order which included an amount the wrongfully-discharged employee would "in all probability" have received as a pay raise had he not been discharged. The decision must be read in light of the fact that the failure of the employer to grant the pay raise was in itself wrongful and discriminatory. The court was of the opinion that "[t]he relief granted was therefore necessary to extinguish the effects of the discrimination." *NLRB* v. *Mooney Aircraft, Inc., supra* at 403. Thus the remedy both in the *Fibreboard* and *Mooney Aircraft* cases was based on pre-existing contract rights. They are scarcely authority for the proposition that the Board may in effect write a contract where one did not exist before, and then base its remedy on the contract it has written.

The majority cautions that the "make whole" remedy "could be measured not by any sentiment as to what the parties *should* have agreed to, but only by a determination,

on the basis of all the evidence available, of what it is likely the parties *would* have agreed to. . . ." The Board, according to the majority opinion, is thus required to determine what the parties would have agreed to if they had bargained. However, if any prediction were to be made, the history of this case seems to make it clear that the most realistic prediction would be that the parties would not have agreed to anything. Any other conclusion is difficult to reach in light of the Company president's "antiunion animus" and the "patently frivolous" objections to the election. In my opinion, the Board is thus necessarily relegated to a determination of what the parties *should* have agreed to had they bargained. In time, such power may well prove dangerous both to unions and to employers.

But this is not the greatest problem I have with the majority opinion. Even if the Board could somehow predict what the parties would have agreed to, the wrong is still that any such process would require the Board to determine a "substantive contractual provision." That the Board acts in the past rather than the present does not, in my opinion, eliminate the prohibition in this respect of *H. K. Porter Co. v. NLRB, supra.* In that case, Justice Black concluded:

> It may well be true, as the Court of Appeals felt, that the present remedial powers of the Board are insufficiently broad to cope with important labor problems. But it is the job of Congress, not the Board or the courts, to decide when and if it is necessary to allow governmental review of proposals for collective bargaining agreements and compulsory submission to one side's demands. The present Act does not envision such a process. *H. K. Porter Co.* v. *NLRB, supra* at 4180.

The power the majority opinion seeks to have the Board apply has been expressly withheld by Congress. 1 *Legislative History of the Labor Management Relations Act*, 1947,

pp. 310, 538. In the language of the House Conference Report No. 510 on H. R. 3070, 80th Congress,

> "This mutual obligation (to engage in collective bargaining) was not to compel either party to agree to a proposal or require the making of a concession." p. 538.

The fundamental error of the majority opinion is thus that it would authorize damages on the likelihood that certain results would be reached that the Act provides are not required to be reached. Here the cause of the alleged damage for which the Union requests reimbursement is actually the refusal of the Company to agree to a contract (not the failure to bargain collectively) but no damages can be assessed therefor because there is no legal duty upon either party to agree upon a contract. Thus, even assuming a failure to *bargain*, the damages here are not being assessed on that basis but upon a failure to agree, which is not a duty imposed on either party, and a failure to agree upon a specific result, which is entirely speculative.

I would accordingly affirm the Board's order in No. 22911 and deny the Union's petition in No. 22797.

Judgment of the United States Court of Appeals for the District of Columbia Circuit entered May 18, 1970

Before: LEVENTHAL, ROBINSON and MACKINNON, *Circuit Judges.*

This case came on to be heard upon the petition to review, and an application for enforcement of, an order of the National Labor Relations Board dated February 24, 1969, against Tiidee Products, Inc., its officers, agents, successors, and assigns. The Court heard argument of respective counsel on October 27, 1969, and has considered the briefs and transcript of record filed in this case. On April 3, 1970, the Court, being fully advised in the premises, handed down its opinion granting the Board's application to enforce its order as already entered in the above matter against Tiidee Products, Inc., and remanding the Union's petition seeking additional relief for further proceedings, consistent with the Court's opinion. In conformity therewith, it is hereby,

ORDERED AND ADJUDGED by the United States Court of Appeals for the District of Columbia Circuit that the said order of the National Labor Relations Board against Tiidee Products, Inc., be enforced as already entered, and that Tiidee Products, Inc., its officers, agents, successors, and assigns abide by and perform the directions of the Board in said order contained; and that the Union's request for additional relief be remanded to the Board for further proceedings consistent with the Court's opinion.

HAROLD LEVENTHAL,
Circuit Judge, United States Court of Appeals for the District of Columbia Circuit.

SPOTTSWOOD W. ROBINSON, III,
Circuit Judge, United States Court of Appeals for the District of Columbia Circuit.

GEORGE E. MACKINNON,
Circuit Judge, United States Court of Appeals for the District of Columbia Circuit.

Order of the United States Court of Appeals for the District of Columbia Circuit entered May 18, 1970

Treating the motion of Tiidee Products, Inc., of April 22, 1970, as a motion to intervene in No. 22,797, *International Union of Electrical, Radio and Machine Workers* v. *NLRB*, that motion is granted and, it is

Ordered by the Court that Tiidee Products, Inc., shall be made a party intervenor in case No. 22,797.

Per Curiam

Order of the United States Court of Appeals for the District of Columbia Circuit entered July 10, 1970

On consideration of the petition of Tiidee Products, Inc., for rehearing, it is

Ordered by the Court that the aforesaid petition of Tiidee Products, Inc., is denied.

Per Curiam.

Circuit Judge MacKinnon would grant the petition of Tiidee Products, Inc. for rehearing.

Letter dated July 8, 1970 from the Clerk of the U. S. Court of Appeals for the District of Columbia, to Counsel for Petitioner

Mr. Roy E. Browne
1910 First National Tower
Akron, Ohio 44308

Dear Mr. Browne:

Enclosed is a copy of the order denying your petition for rehearing. Your suggestion that this case be reheard by the Court *en banc* was transmitted to the full Court.

The purpose of this letter is to inform you that there not being a majority of the Judges in regular active service in favor of having this case reheard *en banc*, it is not anticipated that any further action will be taken with respect thereto.

Yours very truly,

/s/ NATHAN J. PAULSON,
Nathan J. Paulson,
Clerk.

NJP/mef
Enclosure
cc: Ruth Weyand
Milton A. Smith
Marcel Mallet-Prevost

Order of the United States Court of Appeals for the District of Columbia Circuit entered August 7, 1970

On consideration of the motion of Tiidee Products, Inc. to stay issuance of mandate and of the oppositions filed with respect thereto, it is

Ordered by the Court that the issuance of the mandate is stayed for a period of 30 days from the date of this order.

Per Curiam.

Motion of Tiidee Products, Inc. for Leave to File Second Petition for Rehearing and for Enlargement of Time to File Petition for Rehearing, Filed September 1, 1970, Presently Pending Before the United States Court of Appeals for the District of Columbia Circuit.

MOTION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING AND FOR ENLARGEMENT OF TIME TO FILE PETITION FOR REHEARING.

Tiidee Products, Inc. hereby moves the Court for leave to file a second Petition for Rehearing and for enlargement of time in which to file said Petition for Rehearing. In support whereof, the following is respectfully shown:

1. On July 10, 1970 Tiidee's Petition for Rehearing was denied. Thereafter, in *Ex-Cell-O Corp.*, 185 NLRB No. 20, 74 LRRM 1740, dated August 25, 1970 and made public August 29, 1970 (a copy of which is attached hereto), the National Labor Relations Board issued a landmark decision involving the very issue involved in the instant case. The Court's opinion herein had, in fact, been premised on the Board's failure, at that time, to have rendered its opinion in *Ex-Cell-O* and to have resolved the issues here involved. Sl. Op., pp. 11-12. Similarly, in *Ex-Cell-O*, the Board specifically noted and discussed at length this Court's decision in the instant case. 74 LRRM 1741-2.

2. In *Ex-Cell-O*, the Board determined that, notwithstanding the considerations set forth in this Court's decision in the instant case, it could not approve an order which required that an employer "compensate its employees for monetary losses incurred as a consequence of the [employer's] determination to refuse to bargain until it had tested in Court the validity of the Board's certification." 74 LRRM 1741. The Court further stated that "With due respect for the opinion of the Court of Appeals

for the District of Columbia [in the present case], we can not agree that the application of a compensatory remedy in 8(a) (5) can be fashioned on the subjective determination that the position of one respondent is 'debatable' while that of another is 'frivolous'." 74 LRRM 1742. The Board concluded, on the basis of its interpretation of the Act and the Supreme Court's decision in *H. K. Porter Company* v. *NLRB*, 397 U. S. 99, that a "make-whole" remedy such as that sanctioned by the decision of this Court was "as the law now stands . . . a matter for Congress, not the Board." 74 LRRM 1743. The *Ex-Cell-O* decision, in short, makes abundantly apparent the Board's views on this matter and obviates the necessity of a remand of the instant case.

3. In view of the overriding significance of the Board's decision in *Ex-Cell-O* to the present case, it is respectfully submitted that, pursuant to Rule 40 of the Federal Rules of Appellate Procedure, leave should be granted to Tiidee to file a second Petition for Rehearing and the time for filing said Petition should be enlarged for a period of seven (7) days from the date of the Court's ruling on this Motion, or any other period which the Court may consider reasonable, to permit the filing thereof.

Respectfully submitted,

ROY E. BROWN,
HERSHEY, BROWN, WILSON, STEEL, COOK & WOLFE,
1910 First National Tower,
Akron, Ohio 44308,
LAWRENCE M. COHEN,
LEDERER, FOX & GROVE,
111 West Washington Street,
Chicago, Illinois 60602,
Attorneys for Respondent, Tiidee Products, Inc.

ALAN RAYWID,
COLE, ZYLSTRA & RAYWID,
2011 Eye Street, N. W.,
Washington, D. C. 20006,
Of Counsel.

Letter dated April 29, 1970 from Roy E. Browne, Counsel for Petitioner, to John C. Getreu, Regional Director, Ninth Region, National Labor Relations Board

In re: Tiidee Products, Inc. 174 NLRB No. 103
(Cases 9-CA-4400, 4488, 4536 and 4563)

Dear Mr. Getreu:

In view of the enforcement by a decision of the Court of Appeals for the District of Columbia on April 3, 1970, in their Case No. 22,911 of the Board's Order in the above captioned case, please be advised that Respondent Tiidee Products, Inc. will comply with the Board's Order of February 24, 1969 and will also take the affirmative action requested therein including bargaining, upon request, with the Charging Party.

In view of the foregoing, will you please advise us of what steps are necessary to achieve compliance. This letter only pertains to the captioned case and is not in any way to be construed to admit or apply to the findings of the Board in 176 NLRB No. 133, now pending before the Court in their Cases 23,209 and 23,321. The Respondent also expressly does not agree to the imposition of any additional remedy, including any of the remedies requested by the Charging Party in Court of Appeals Case No. 22,797, apart from those expressly required by the Board's Order herein. The Respondent believes that the Charging Party's position in Case No. 22,797 is totally without merit and agrees with the position of the Board in that case. It intends to seek by all legal means available, including a petition for re-hearing en banc and, if necessary, petition for writ of certiorari to the United States Supreme Court,

to obtain a reversal of that portion of the Court's decision involving Case No. 22,797.

Very truly yours,

ROY E. BROWNE,
Attorney for Respondent Tiidee Products, Inc.

REB:ps

APPENDIX C.

Decision and Order of the National Labor Relations Board in Ex-Cell-O Corporation, 185 NLRB No. 20, dated August 25, 1970, made public August 29, 1970, Appeal Docketed Sub. Nom. Automobile Workers v. NLRB, No. 24577, D. C. Cir., August 26, 1970 (Trial Examiner's Decision omitted)

DECISION AND ORDER

On March 2, 1967, Trial Examiner Owsley Vose issued his Decision in the above-entitled proceeding, finding that Respondent Ex-Cell-O Corporation had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, including an order directing the Respondent to make whole its employees for any losses suffered on account of its unlawful refusal to bargain with the UAW (the Charging Party), as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief, together with a request for oral argument. As the compensatory remedy adopted by the Trial Examiner in this case poses novel issues of importance, the National Labor Relations Board granted oral argument and consolidated this matter for purposes of said argument with three other cases involving the same or related issues (*Zinke's Foods, Inc.*, 30-CA-372; *Herman Wilson Lumber Company*, 26-CA-2536; *Rasco Olympia, Inc. d/b/a Rasco 5-10-25 Cents*, 19-CA 3187).

The Board granted a number of motions for permission to file briefs *amicus curiae* and also invited certain other

interested parties to file them and to participate in the oral argument which was held on July 12 and 13, 1967. The parties who submitted amicus briefs and participated as such in the argument were: The Chamber of Commerce of the United States, the National Association of Retail Merchants, The American Federation of Labor and Congress of Industrial Organizations, and The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Amicus briefs were also submitted by the National Association of Manufacturers, Preston Products Company, Inc., and The NAACP Legal Defense and Educational Fund, Inc.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, cross-exceptions, the briefs of the parties and those submitted *amicus curiae*, the oral arguments made before the Board, and the record in the proceeding, and adopts the findings, conclusions, and recommendations of the Trial Examiner, as modified herein.[1]

This case began with the UAW's request for recognition on August 3, 1964. Ex-Cell-O refused the Union's request on August 10, 1964, and the Union immediately filed a petition for Certification of Representative. After a hearing the Regional Director ordered an election, which was held on October 22, 1964, and a majority of the employees voted for the Union. The Company, however, filed objections to the conduct of the election, alleging that the Union

1. The Respondent's motion, filed on August 19, 1970, seeking dismissal of the complaint herein is denied. *N. L. R. B.* v. *Gissel Packing Co.*, 395 U. S. 575, 610; *N. L. R. B.* v. *Katz*, 369 U. S. 736, 748, fn. 16; *Franks Bros. Co.* v. *N. L. R. B.*, 321 U. S. 702. See also *N. L. R. B.* v. *Rutter-Rex Manufacturing Company, Inc.*, 396 U. S. 258.

made certain misrepresentations which assertedly interferred therewith, but the Acting Regional Director, in a Supplemental Decision of December 29, 1964, overruled them. The Company then requested review of that decision, which the Board granted, and a hearing was held on May 18 and 19, 1965. The Hearing Officer issued his Report on Objections on July 15, 1965, and recommended that the objections be overruled. The Company filed exceptions thereto, but on October 28, 1965, the Board adopted the Hearing Officer's findings and recommendations and affirmed the Regional Director's certification of the Union.

The day after the Board's certification was issued, the Company advised the Union that it would refuse to bargain in order to secure a court review of the Board's action[2] and later reiterated this position after receiving the Union's request for a bargaining meeting. The Union thereupon filed the 8(a)(1) and (5) charge in this case and the complaint was issued on November 23, 1965. The Respondent's answer admitted the factual allegations of the complaint but denied the violation on the ground that the Board's certification was invalid. The hearing herein, originally scheduled for February 15, 1966, commenced on June 1, 1966;[3] it was adjourned until June 29, 1966, to permit the Union to offer evidence supporting its request for a compensatory remedy for the alleged refusal to bargain; the hear-

2. The Company's letter stated that:

> We have received the Labor Board's decision concerning our objections to the conduct of the union election held October 22, 1964. As you know, the only way the Labor Board's decision in this case can be reviewed is through a technical refusal to bargain, and consequently we are unable to meet with you and bargain until the review procedure is carried out.

3. This delay was caused by Respondent's unsuccessful attempt to supoena the Regional Director's files in the representation case.

ing was postponed again until July 28, 1966.[4] The Company also petitioned the United States District Court for an injunction against the Regional Director and the Trial Examiner to restrain the latter from closing the hearing until the Regional Director had produced the investigative records in the reprsentation case. The court issued a summary judgment denying the injunction on December 13, 1966, and on December 21, 1966, the Trial Examiner formally closed his hearing. On March 2, 1967, the Trial Examiner issued his Decision, finding that the Company had unlawfully refused to bargain in violation of Section 8(a)(5) and (1) of the Act and recommended the standard bargaining order as a remedy. In addition the Trial Examiner ordered the Company to compensate its employees for monetary losses incurred as a result of its unlawful conduct.

It is not disputed that Respondent refused to bargain with the Union, and we hereby affirm the Trial Examiner's conclusion that Respondent thereby violated Section 8(a)(1) and (5) of the Act. The compensatory remedy which he recommends, however, raises important issues concerning the Board's powers and duties to fashion appropriate remedies in its efforts to effectuate the policies of the National Labor Relations Act.

It is argued that such a remedy exceeds the Board's general statutory powers. In addition, it is contended that it cannot be granted because the amount of employee loss, if any, is so speculative that an order to make employees whole would amount to the imposition of a penalty. And the position is advanced that the adoption of this remedy

4. This postponement grew out of the Company's objections to the authenticity of certain collective-bargaining contracts offered by the Union to substantiate its request for a compensatory remedy. The Company later withdrew its objection. It also refused to comply with a *subpoena duces tecum* requesting production of certain records relating to wage increases and fringe benefits.

would amount to the writing of a contract for the parties, which is prohibited by Section 8(d)[5]

We have given most serious consideration to the Trial Examiner's recommended financial reparations Order, and are in complete agreement with his finding that current remedies of the Board designed to cure violations of Section 8(a)(5) are inadequate. A mere affirmative order that an employer bargain upon request does not eradicate the effects of an unlawful delay of 2 or more years in the fulfillment of a statutory bargaining obligation. It does not put the employees in the position of bargaining strength they would have enjoyed if their employer had immediately recognized and bargained with their chosen representative. It does not dissolve the inevitable employee frustration or protect the Union from a loss of employee support attributable to such delay. The inadequacy of the remedy is all the more egregious where, as in the recent *N. L. R. B.* v. *Tiidee Products, Inc.*,[6] case, the court found that the employer had raised "frivolous" issues in order to postpone or avoid its lawful obligation to bargain. We have weighed thse considerations most carefully. For the reasons stated below, however, we have reluctantly concluded that we cannot approve the Trial Examiner's Recommended Order that Respondent compensate its employees for monetary losses incurred as a consequence of Respondent's determination to refuse to bargain until it had tested in court the validity of the Board's certification.

Section 10(c) of the Act directs the Board to order a person found to have committed an unfair labor practice to cease and desist and "to take such affirmative action in-

5. 49 Stat. 454 (1935), as amended, 29 U. S. C. § 158(d) (1958): "but such obligation [to bargain collectively] does not compel either party to agree to a proposal or require the making of a concession. . . ."

6. .... F. 2d .... (C. A. D. C., April 3, 1970).

cluding reinstatement of employees with or without back pay, as will effectuate the policies of this Act." This authority, as our colleagues note with full documentation, is extremely broad and was so intended by Congress. It is not so broad, however, as to permit the punishment of a particular respondent or a class of respondents. Nor is the statutory direction of the Board so compelling that the Board is without discretion in exercising the full sweep of its power, for it would defeat the purpose of the Act if the Board imposed an otherwise proper remedy that resulted in irreparable harm to a particular respondent and hampered rather than promoted meaningful collective bargaining. Moreover, as the Supreme Court recently emphasized, the Board's grant of power does not extend to compelling agreement. (*H. K. Porter Co., Inc.* v. *N. L. R. B.*, 397 U. S. 99.) It is with respect to these three limitations upon the Board's power to remedy a violation of Section 8(a)(5) that we examine the UAW's requested remedy in this case.

The Trial Examiner concluded that the proposed remedy was not punitive, that it merely made the employees partially whole for losses occasioned by the Respondent's refusal to bargain, and was much less harsh than a back-pay order for discharged employees, which might require the Respondent to pay wages to these employees as well as their replacements. Viewed solely in the context of an assumption of employee monetary losses resulting directly from the Respondent's violation of Section 8(a)(5), as finally determined in court, the Trial Examiner's conclusion appears reasonable. There are, however, other factors in this case which provide counter weights to that rationale. In the first place, there is no contention that this Respondent acted in a manner flagrantly in defiance of the statutory policy. On the contrary, the record indicates that this Respondent responsibly fulfills its legally estab-

lished collective-bargaining obligations. It is clear that Respondent merely sought judicial affirmance of the Board's decision that the election of October 22, 1964, should not be set aside on the Respondent's objections. In the past whenever an employer has sought court intervention in a representation proceeding the Board has argued forcefully that court intervention would be premature, that the employer had an unquestioned right under the statute to seek court review of any Board order before its bargaining obligation became final. Should this procedural right in 8(a)(5) cases be tempered by a large monetary liability in the event the employer's position in the representation case is ultimately found to be without merit? Of course, an employer or a union, which engages in conduct later found in violation of the Act, does so at the peril of ultimate conviction and responsibility for a make-whole remedy. But the validity of a particular Board election tried in an unfair labor practice case is not, in our opinion, an issue on the same plane as the discharge of employees for union activity or other conduct in flagrant disregard of employee rights. There are wrongdoers and wrongdoers. Where the wrong in refusing to bargain is, at most, a debatable question, though ultimately found a wrong, the imposition of a large financial obligation on such a respondent may come close to a form of punishment for having elected to pursue a representation question beyond the Board and to the courts. The desirability of a compensatory remedy in a case remarkably similar to the instant case was recently considered by the Court of Appeals for the District of Columbia in *United Steelworkers [Quality Rubber Manufacturing Company, Inc.]* v. *N. L. R. B.*, ... F. 2d ..... (July 10, 1970). There the court, distinguishing *Tiidee Products, supra*, indicated that the Board was warranted in refusing to grant such a remedy in an 8(a)(5) case where the employer "desired only to

obtain an authoritative determination of the validity of the Board's decision." It is not clear whether the court was of the opinion that the requested remedy was within the Board's discretion or whether it would have struck down such a remedy as punitive in view of the technical nature of the respondent's unfair labor practice. In any event, we find ourselves in disagreement with the Trial Examiner's view that a compensatory remedy as applied to the Respondent in the instant case is not punitive "in any sense of the word."

In *Tiidee Products* the court suggested that the Board need not follow a uniform policy in the application of a compensatory remedy in 8(a)(5) cases. Indeed, the court noted that such uniformity in this area of the law would be unfair when applied "to unlike cases." The court was of the opinion that the remedy was proper where the employer had engaged in a "manifestly unjustifiable refusal to bargain" and where its position was "palpably without merit."[7] As in *Quality Rubber*, the court in *Tiidee Products* distinguished those cases in which the employer's failure to bargain rested on a "debatable question." With due respect for the opinion of the Court of Appeals for the District of Columbia, we cannot agree that the application of a compensatory remedy in 8(a)(5) cases can be fashioned on the subjective determination that the position of one respondent is "debatable" while that of another is "frivolous." What is debatable to the Board may appear frivolous to a court, and vice versa.[8] Thus, the debatability

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7. In these cases, at least, it would seem incumbent on the Board to utilize to the fullest extent its authority under Section 10(j) and (e) of the Act, thereby minimizing the pernicious delay in collective bargaining and consequent loss of benefits to the employees affected. See also Justice Harlan's concurrence in *H. K. Porter, supra.*

8. *Cf. N. L. R. B. v. Magnesium Casting Co.*, ... F. 2d.... (C. A. 1, May 21, 1970).

of the employer's position in an 8(a)(5) case would itself become a matter of intense litigation.

We do not believe that the critical question of the employer's motivation in delaying bargaining should depend so largely on the expertise of counsel, the accident of circumstances, and the exigencies of the moment.

In our opinion, however, the crucial question to be determined in this case relates to the policies which the requested order would effectuate. The statutory policy as embodied in Section 8(a)(5) and (d) of the Act was considered at some length by the Supreme Court in *H. K. Porter Co., Inc.* v. *N. L. R. B.*, *supra*. There the Court held that the Board had power to require employers and employees "to negotiate" but that the Board was without power to compel a company or a union "to agree to any substantive contractual provision of a collective bargaining agreement." The purpose of the Act, the Court held, was to ensure that employers and their employees "work together to establish mutually satisfactory conditions." The Court noted that Congress was aware that agreement between employers and unions might not always be reached, that agreement might in some cases be impossible, or thwarted by strikes and lockouts. But it was never intended, the Court held, that the Government in such cases step in and become a party to the negotiations. Recognizing that the Board's remedial powers might be insufficient to cope with important labor problems, the Supreme Court nevertheless struck down an order requiring the respondent employer involuntarily to agree to a specific contractual provision. It was the job of Congress, not the Board or the courts, Justice Black wrote, "to decide when and if it is necessary to allow governmental review of proposals for collective bargaining agreements and compulsory submission to one side's demands."

It is argued that the instant case is distinguishable from *H. K. Porter* in that here the requested remedy merely would require an employer to compensate employees for losses they incurred as a consequence of their employer's *failure to agree* to a contract he *would* have agreed to *if* he had bargained in good faith. In our view, the distinction is more illusory than real. The remedy in *H. K. Porter* operates propectively to bind an employer to a specific contractual term. The remedy in the instant case operates retroactively to impose financial liability upon an employer flowing from a *presumed* contractual agreement. The Board infers that the latter contract, though it never existed and does not and need not exist, was *denied* existence by the employer because of his refusal to bargain. In either case the employer has not agreed to the contractual provision for which he must accept full responsibility *as though he had agreed to it*. Our colleagues contend that a compensatory remedy is not the "writing of a contract" because it does not "specify new or continuing terms of employment and does not prohibit changes in existing terms and conditions." But there is no basis for such a remedy unless the Board finds, as a mater of fact, that a contract would have resulted from bargaining. The fact that the contract, so to speak, is "written in the air" does not diminish its financial impact upon the recalcitrant employer who, willy-nilly, is forced to accede to terms never mutually established by the parties. Despite the admonition of the Supreme Court that Section 8(d) was intended to mean what it says, i.e., that the obligation to bargain "does not compel either party to agree to a proposal or require the making of a concession," one of the parties under this remedy is forced by the Government to submit to the other side's demands. It does not help to argue that the remedy could not be applied unless there was substantial evidence that the employer would have yielded to these

demands during bargaining negotiations. Who is to say in a specific case how much an employer is prepared to give and how much a union is willing to take? Who is to say that a favorable contract would, in any event, result from the negotiations? And it is only the employer of such good will as to whom the Board might conclude that he, at least, would have given his employees a fair increase, who can be made subject to a financial reparations order; should such an employer be singled out for the imposition of such an order? To answer these questions the Board would be required to engage in the most general, if not entirely speculative, inferences to reach the conclusion that employees were deprived of specific benefits as a consequence of their employer's refusal to bargain.

Much as we appreciate the need for more adequate remedies in 8(a)(5) cases, we believe that, as the law now stands, the proposed remedy is a matter for Congress, not the Board. In our opinion, however, substantial relief may be obtained immediately through procedural reform, giving the highest possible priority to 8(a)(5) cases combined with full resort to the injunctive relief provisions of Section 10(j) and (e) of the Act.

ORDER.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Ex-Cell-O Corporation, Elwood, Indiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, as the exclusive representative of the employees in the appropriate unit as set forth in the attached Trial Examiner's Decision.

(b) Interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which it is found will affectuate the policies of the Act:

(a) Upon request recognize and bargain collectively with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, as the exclusive representative of the employees in the appropriate unit. The appropriate unit is:

> All production and maintenance employees, including tool crib store employees, shipping and receiving and follow-up employees, but excluding all office clerical and plant clerical employees, all professional employees, guards, and supervisors.

(b) Post at its Elwood, Indiana, plant copies of the attached notice marked "Appendix."[9] Copies of said

9. In the event this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

notice, on forms provided by the Regional Director for Region 25, after being duly signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 25, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D. C.

EDWARD B. MILLER,
Chairman,

JOHN H. FANNING,
Member,

HOWARD JENKINS, JR.,
Member,

National Labor Relations Board

(SEAL)

Members McCulloch and Brown, dissenting in part:

Although concurring in all other respects in the Decision and Order of the Board, we part company with our colleagues on the majority in that we would grant the compensatory remedy recommended by the Trial Examiner. Unlike our colleagues, we believe that the Board has the statutory authority to direct such relief and that it would effectuate the policies of the Act to do so in this case.

Section 10(c) of the Act directs the Board to remedy unfair labor practices by ordering the persons committing them to cease and desist from their unlawful conduct "and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. . . ."[10] The phrase "affirmative action" is nowhere qualified in the statute, except that such action must "effectuate the policies of this Act," and indicates the intent of Congress to vest the Board with remedial powers coextensive with the underlying policies of the law which is to be enforced. This provision "did not pass the Wagner Act Congress without objection to the uncontrolled breadth of this power."[11]

But the broad language survived the challenge.

The contention made by the Respondent herein that legislative history requires a narrow construction of the Board's remedial powers under Section 10(c) focuses on the deletion of the word "restitution" by the Senate and House Committees in reporting the original bills and their substitution therefor of the language: "including rein-

10. 49 Stat. 454 (1935), as amended, 29 U. S. C. § 160(c) (1958).

11. *Local 60, United Brotherhood of Carpenters and Joiners of America, AFL-CIO* [*Mechanical Handling Systems*] v. *N. L. R. B.*, 365 U. S. 651, 657 (concurring opinion).

statement . . . with or without back pay.'"[12] It is argued that because this change was made after a Senate Committee print asserted that "express language such as reinstatement, backpay etc., necessarily results in narrowing the definition of restitution,"[13] the subsequent deletion and substitution evidence congressional intent to restrict the Board's remedial power. This interpretation of the legislative history is negated by a closer look at the status of the Senate Committee print, and the statement of Senator Wagner, the author of the legislation, respecting the scope of the Board's remedial power under the present language of Section 10(c).

The assertion that substitution of the illustrative language "including reinstatement . . . with or without back pay" would narrow the definition of restitution was contained in an unsigned staff memorandum prepared for use by the Senate Committee. Whatever the status of such a document for purposes of legislative interpretation, it does not by itself prove congressional intent, especially when it is relied on, as here, to dispute the plain meaning of the statutory language.[14] Further, after the Wagner

12. Compare 1 Legislative History of the National Labor Relations Act, 1935 at 1302 with 2 Legislative History of the National Labor Relations Act, 1935 at 2292.

13. 1 Legislative History of the National Labor Relations Act, 1935 at 1360.

14. "Restitution" is a term of art used and misused in both common law and equity to describe particular techniques for judicial enforcement and maintenance of rights, and is distinguishable conceptually, but not always realistically, from damages and specific performance. Thus, the term is imprecise both in meaning and application. See, for example, Corbin, Contracts, §§ 1102-1103, 1107; Williston, Contracts §§ 1454, 1482-1483. Indeed, the American Law Institute's Restatement of the Law of Restitution does not include remedies for torts such as ejectment, replevin, or trover, even though restitutionary in nature, and most significantly that Restatement recites that it "does not present the circumstances under which an action can be maintained . . .

Act had been reported out of committee with the present language of Section 10(c), Senator Wagner stated, in floor debates, that under its provisions "the Board will be empowered to issue orders forbidding violations of the law and making restitution to those who have been injured thereby."[15] Clearly, although the legal phrase had been eliminated from the Act, its sponsor's intent was not thereby to narrow the concept of the Board's remedial powers. And, this broad construction of Section 10(c) has long been accepted by the courts.

The Supreme Court, in its consideration of the Board's remedial powers, has consistently interpreted Section 10(c) as allowing the Board wide discretion in fashioning remedies. Thus, in *Phelps Dodge Corp.* v. *N. L. R. B.*,[16] the Court stated that:

> Attainment of a great national policy through expert administration in collaboration with limited judicial review must not be confined within narrow canons for equitable relief deemed suitable by chancellors in ordinary private controversies.

The need for such broad remedial authority was obvious, for, as the Court went on to say:

> . . . Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act.

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for a failure to perform an official, customary or statutory duty to pay money. . . ." Restatement, Restitution at 2-3. Dean Roscoe Pound made a comparable distinction in his treatise on jurisprudence in emphasizing that administrative modes for the enforcement and maintenance of rights deserve separate treatment from judicial techniques. Pound, Jurisprudence at 351 (1959). From this background it is apparent that inclusion of the term "restitution" in Section 10(c) would not have been appropriate to illustrate a broad flexible administrative remedy, and its deletion is readily understandable as a matter of draftsmanship.

15. 2 Legislative History of the National Labor Relations Act, 1935 at 2332.

16. 313 U. S. 177, 187-189.

> Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration.[17]

The declared policy of the Act is to promote the peaceful settlement of disputes by encouraging collective bargaining and by protecting employee rights.[18] To accomplish this purpose, Board remedies for violations of the Act should, on one hand, have the effect of preventing the party in violation from so acting in the future, and from enjoying any advantage he may have gained by his unlawful practices.[19] But they must also presently dissipate the effects of violations on employee rights[20] in order that the employees so injured receive what they should not have been denied.[21] A Board order so devised is to be enforced by the courts "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act."[22]

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17. *Id.* at 194.

18. 49 Stat. 552 (1935), as amended, 29 U. S. C. § 151 (1958).

19. *National Licorice Co.* v. *N. L. R. B.*, 309 U. S. 350, 364.

20. See, e.g., *Franks Bros. Company* v. *N. L. R. B.*, 321 U. S. 702, 704; *N. L. R. B.* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, 257. ("The purpose of the Act is to promote the peaceful settlement of disputes by providing legal remedies for the invasion of employee rights.")

21. *International Brotherhood of Operative Potters [Aztec Ceramics Co.]* v. *N. L. R. B.*, 320 F. 2d 757, 761 (C. A. D. C.), enfg. in part and remanding in part 138 NLRB 1178; *Leeds & Northrup Co.* v. *N. L. R. B.*, 391 F. 2d 874 (C.A. 3), enfg. 162 NLRB 987.

22. *Fibreboard Paper Products Corp.* v. *N. L. R. B.*, 379 U. S. 203, 216, citing with approval *Virginia Electric and Power Co.* v. *N. L. R. B.*, 319 U. S. 533, 540. In *Consolo* v. *Federal Maritime Commission*, 383 U. S. 607, the Supreme Court upheld a compensatory award by that Commission, which, like the Board, is among a number of administrative agencies that may grant com-

Deprivation of an employees' statutory rights is often accompanied by serious financial injury to him. Where this is so, an order which only guarantees the exercise of his rights in the future often falls far short of expunging the effects of the unlawful conduct involved. Therefore, one of the Board's most effective and well-established affirmative remedies for unlawful conduct is an order to make employees financially whole for losses resulting from violations of the Act.[23] Various types of compensatory orders have been upheld by the Supreme Court in the belief that "Making the workers whole for losses suffered on account of an unfair practice is part of the vindication of the public policy which the Board enforces."[24] The most familiar of these is the backpay order used to remedy the effect of employee discharges found to be in violation of Section 8(a)(3) of the Act.[25] While the cease-and-desist

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pensatory remedies. See 39 Stat. 736, as amended, 46 U. S. C. § 821 (1964), which states that the Commission "may direct payment . . . of full reparation to the complainant for the injury caused by such violation." There the petitioner had also suffered financial loss because of the respondent's statutory violation, and the Court, relying heavily on cases involving this Board, stated (383 U. S. at 620-621) that Congress was very deliberate in limiting judicial review of agency determinations because:

> It frees the reviewing courts of the time-consuming and difficult task of weighing the evidence, it gives proper respect to the expertise of the administrative tribunal and it helps promote the uniform application of the statute. These policies are particularly important when a court is asked to review an agency's fashioning of discretionary relief. In this area agency determinations frequently rest upon a complex and hard-to-review mix of considerations. By giving the agency discretionary power to fashion remedies, Congress places a premium upon agency expertise. . . .

23. *Virginia Electric and Power Company* v. *N. L. R. B.*, *supra* at 544.

24. *Phelps Dodge Corp.* v. *N. L. R. B.*, fn. 16, *supra* at 197.

25. This remedy has been ordered since the Board reported its first case in 1935. *Pennsylvania Greyhound Lines, Inc.*, 1 NLRB 1, enfd. 303 U. S. 261.

and reinstatement orders remedy the denial of the aggrieved employee's rights and protect the prospective exercise thereof, the backpay order repairs the financial losses which have been suffered, and, in thus making the employee whole,[26] serves to recreate, as fully as possible, the conditions and relationships that would have been, had there been no unfair labor practice.[27]

As a result of its experience over the years, the Board has made modifications in its backpay orders to make them more effective. Thus, in *Isis Plumbing & Heating Co.*[28] the Board ordered that interest at 6 percent be added to the reimbursement of wages lost by employees as a result of a respondent's wrong, in order to achieve a more equitable result and to encourage compliance with Board orders. The U. S. Court of Appeals for the District of Columbia, in upholding the Board's power to award such compensation, noted that even though the Board has waited for about 25 years to employ the interest mechanism, it could not close its eyes to the realities of the employees' position, and that in the evaluation of the law of remedies "some things are bound to happen for the 'first time.' "[29]

An earlier example of such modification occurred in *F. W. Woolworth Company*,[30] after the Board became aware that in numerous cases, after a long period of unemployment following their discriminatory discharges, employees suc-

26. Cf. *Nathanson* v. *N. L. R. B.*, 344 U. S. 25; *N. L. R. B.* v. *Deena Artware, Inc.*, 361 U. S. 398 (concurring opinion of Mr. Justice Frankfurter).

27. *Local 60, United Brotherhood of Carpenters* v. *N. L. R. B.*, *supra* (concurring opinion of Mr. Justice Harlan); *Leeds & Northrup Co.* v. *N. L. R. B.*, *supra*.

28. 138 NLRB 716.

29. *International Brotherhood of Operative Potters* v. *N. L. R. B.*, *supra* at 761. See *ABC Air Freight Co., Inc.* v. *C. A. B.*, 391 F. 2d 295 (C. A. 2), concerning the need for flexibility.

30. 90 NLRB 289.

ceeded in obtaining higher paying jobs. With the type of backpay order then in effect, some employers secured an advantage by being dilatory and refraining from offering reinstatement, for greater delay meant a progressive reduction or even complete elimination of backpay due. Further, employees who saw this steady reduction of their backpay would waive their right to reinstatement in order to toll the running of the period and freeze the amount of backpay owing at the highest possible amount. In *Woolworth*, the Board countered this stratagem of delay by ordering that backpay be computed on a quarterly basis, with the earnings in one particular quarter having no effect upon the backpay liability for any other quarter. The Supreme Court upheld the new method of compensation in *N. L. R. B.* v. *Seven-Up Bottling Company of Miami, Inc.*,[31] and stated that it is the function of the Board to give coordinated effect to the policies of the Act. The Court further indicated that in consideration of the practical interplay of the individual remedies of backpay and reinstatement, "both of which are within the scope of its authority," the Board may fashion one so that it complements, rather than conflicts with, the other.[32]

It is clear from the Act that the Board's compensatory remedies need not be limited to the above situations, and the courts have always interpreted the phrase "with or without back pay" as being merely an illustrative example of the general grant of power to award affirmative relief.[33] The Board, with judicial approval, has also employed make-whole orders to remedy various other type of violations of the Act. In *Virginia Electric and Power Company*

31. 344 U. S. 344.

32. *Id.* at 348.

33. See, e.g., *Virginia Electric and Power Co.* v. *N. L. R. B.*, *supra* at 539; *Radio Officer's Union* v. *N. L. R. B.*, 347 U. S. 17, 54; *Phelps Dodge Corp.* v. *N. L. R. B.*, 313 U. S. 177, 187-189.

v. *N. L. R. B., supra,* for example, the Supreme Court upheld a Board order directing the employer to make whole its employees for dues checked off in favor of a company-dominated union. The Court's rationale in part was that "Like a backpay order, it does restore to the employees in some measure what was taken from them because of the Company's unfair labor practices," and that ". . . both are remedies created by statute—the one explicitly and the other implicitly in the concept of effectuation of the policies of the Act. . . ."[34]

The Board has already recognized in certain refusal-to-bargain situations that the usual bargaining order is not sufficient to expunge the effects of an employer's unlawful and protracted denial of its employees' right to bargain. Though the bargaining order serves to remedy the loss of the legal right and protect its exercise in the future, it does not remedy the financial injury which may also have been suffered. In a number of situations the Board has ordered the employer who unlawfully refused to bargain to compensate its employees for their resultant financial losses. Thus, some employers unlawfully refuse to sign after an agreement. The Board has in these cases ordered the employer to execute the agreement previously reached and, according to its terms, to make whole the employees for the monetary losses suffered because of the unlawful delay in its effectuation.[35]

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34. *Supra* at 543.

35. See, e.g., *Schill Steel Products, Inc.*, 161 NLRB 939; *Huttig Sash and Door Co.*, 151 NLRB 470, enfd. in part 362 F. 2d 217 (C. A. 4). Cf. *N. L. R. B. v. George E. Light Boat Storage, Inc.*, 373 F. 2d 762 (C. A. 5), where the court of appeals enforced the Board's compensatory order which compelled the employer to reimburse employees for back overtime and welfare payments according to the terms of the contract which was unlawfully repudiated in violation of Section 8(a)(5). The court noted that:

> A simple order to bargain in good faith would not be sufficient. To allow an employer unlawfully to repudiate a collective-

Similarly, in *American Fire Apparatus Co.*,[36] the employer violated Section 8(a)(5) by unilaterally discontinuing payment of Christmas bonuses, and the Board concluded that only by requiring the bonuses to be paid could the violation be fully remedied. The Court of Appeals for the Eighth Circuit in enforcing the order commented "Nor do we believe that the difficulty in computing the precise amount due each employee is a substantial reason for modifying the Board's order." In *Leeds & Northrup Co.* v. *N. L. R. B.*, *supra*, which involved a related problem, the Court of Appeals for the Third Circuit reached a similar conclusion. There, the employer unilaterally altered its formula for computing its annual profit-sharing bonus. The Board found that a violation of Section 8(a)(5) had occurred and ordered payment to the employees of the difference between what they had received and the amount they would have been paid under the prior method of computation. In enforcing that order, the court stated:

> The Board's backpay award in this case is supportable on the ground that the union might have successfully resisted all or a portion of the reduction in its share of profits had it been afforded an opportunity to bargain, and the employees should not be left in a worse position than they might have enjoyed if the union had been given the opportunity to bargain. While it is

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bargaining agreement at the small cost of being required, sometime in the future, to sit down and bargain with the union would encourage such violations of the Act. For the period from the breach until a new agreement, if any, is reached pursuant to the Board's bargaining order, the employer would be at liberty to disregard the terms of the contract. The temptation to violate the Act in a situation where the employer would have everything to gain and nothing to lose would be overwhelming.

The principle underlying these decisions has been affirmed by the Supreme Court in *N. L. R. B.* v. *Joseph T. Strong, d/b/a Strong Roofing & Insulating Co.*, 393 U. S. 357.

36. 160 NLRB 1318, enfd. 380 F. 2d 1005 (C. A. 8).

> true that a retroactive order might afford the employees a better position than the union's bargaining might have achieved, the Board can hardly be said to be effectuating policies beyond the purposes of the Act by resolving the doubt against the party who violated the Act. Retroactive enforcement must always contain in it some element of hardship on the employer, but a failure to grant back pay imposes at least an equal hardship on the employees.

And in *Fibreboard Paper Products Corp.*[37] the employer unilaterally contracted out its maintenance operations in violation of Section 8(a)(5). The Board concluded that an order to bargain about this decision could not, by itself, adequately remedy the effects of the violation. It further ordered the employer to reinstate the employees and to make them whole for any loss of earnings suffered on account of the unlawful conduct. The Supreme Court upheld the compensatory remedy, and stated that "There has been no showing that the Board's order restoring the *status quo ante* to insure meaningful bargaining is not well designed to promote the policies of the Act."[38]

The question now before us is whether a reimbursement order is an appropriate remedy for other types of unlawful refusals to bargain. On basis of the foregoing analysis regarding Section 10(c), we believe that the Board has the power to order this type of relief. Further, for the reasons set forth herein, we are of the view that the compensatory remedy is appropriate and necessary in this case to effectuate the policies of the Act.

An employer's unlawful refusal to bargain completely frustrates the purposes of the Act, as it directly con-

37. 138 NLRB 550, enfd. 322 F. 2d 411 (C. A. D. C.), aff'd. 379 U. S. 203.

38. 379 U. S. at 216. See also *N. L. R. B.* v. *Joseph T. Strong, d/b/a Strong Roofing & Insulating Co.*, *supra* at fn. 35.

travenes the congressional policy of encouraging collective bargaining and also denies the statutory right of the employees to bargain collectively through their chosen representative.[39] It is clear from the Act itself and from its legislative history that immediate recognition of this right was contemplated; and partly to achieve this goal Congress, in originally enacting the Act in 1935, excluded Board orders in certification proceedings under Section 9(c) from direct review in the courts.[40] This judgment was reaffirmed in 1947 when a conference committee rejected a proposed House amendment which would have permitted any interested persons to obtain review immediately after certification because "such provision would permit dilatory

39. Both the legislative history of the Act and the decisions of the Supreme Court emphasize the central role of the employees' right to bargain and the correlative duty of employers to honor it. S. Rep. No. 573, 74th Cong. 1st Sess. 12 (1935). See, e.g., *Consolidated Edison Co. of New York, Inc.* v. *N. L. R. B.*, 305 U. S. 197, 236: "The Act contemplates the making of contracts with labor organizations. That is the manifest objective in providing for collective-bargaining."; *N. L. R. B.* v. *Insurance Agents' International Union, AFL-CIO [Prudential Ins. Co.]*, 361 U. S. 477, 483: "It was believed that other rights guaranteed by the Act would not be meaningful if the employer was not under obligation to confer with the union in an effort to arrive at the terms of an agreement."

40. A Board decision in a certification proceeding is not a "final order" made reviewable by Section 10(e) and (f) in the courts of appeals. See, e.g., *American Federation of Labor, et al. [Shipowners' Assn. of the Pacific Coast]* v. *N. L. R. B.*, 308 U. S. 401; *Boire* v. *The Greyhound Corporation*, 376 U. S. 473. The House Report clearly states the policy behind this restriction:

> When an employee organization has built up its membership to a point where it is entitled to be recognized as the representative of the employees for collective bargaining, and the employer refuse to accord such recognition, the union, unless an election can promptly be held to determine the choice of representatives, runs the risk of impairment of strength by attrition and delay while the case is dragging on through the courts, or else is forced to call a strike to achieve recognition by its own economic power. H. R. Rep. No. 972, 74th Cong., 1st Sess. 5-6.

tactics in representation proceedings."[41] Very often, as noted by the Supreme Court, the procedural delays necessary to make a fair determination on charges of unfair labor practices have the effect of postponing indefinitely the performance of employers' statutory duty to bargain, thus depriving employees of their legal right to such collective-bargaining representation.[42] The Board has taken various steps in an effort to relieve the wrongful effects of such delay. Thus, in *Franks Bros. Company*,[43] for example, the Board issued a bargaining order even though the union had lost its majority before the issuance of the complaint alleging the refusal to bargain, and the Supreme Court upheld this action, commenting that to order further elections would be "providing employers a chance to profit from a stubborn refusal to abide by the law. That the Board was within its statutory authority in adopting the remedy which it had adopted to foreclose the probability of such frustrations of the Act seems too plain for anything but statement."[44]

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41. Statement by Senator Taft, 93 Cong. Rec. 6444 (1947), as cited in *Boire* v. *The Greyhound Corporation*, fn. 40, *supra* at 479.

42. *International Association of Machinists, Tool and Die Makers Lodge No. 35 [Serrick Corp.]* v. *N. L. R. B.*, 311 U. S. 72, 82; *Franks Bros. Company* v. *N. L. R. B.*, 321 U. S. 702, 704, where the Court observed that:

> Out of its wide experience, the Board many times has expressed the view that the unlawful refusal of an employer to bargain collectively with its employees' chosen representatives disrupts the employees' morale, deters their organizational activities, and discourages their membership in unions.

43. 44 NLRB 898, enfd. 137 F. 2d 989 (C. A. 1), affd. 321 U. S. 702.

44. *Supra* at 705. See also the Board's policy of computing backpay on a quarterly basis discussed *supra*. Further, in *Bernel Foam Products Co., Inc.*, 146 NLRB 1277, the Board held that the filing of a refusal-to-bargain charge was not foreclosed by the fact that the union lost a representation election, since an employer's unlawful activities could very well have caused the loss.

The present remedies for unlawful refusals to bargain often fall short, as in the present case, of adequately protecting the employees' right to bargain. Recent court decisions, congressional investigations, and scholarly studies have concluded that, in the present remedial framework, justice delayed is often justice denied.[45]

In *N. L. R. B.* v. *Tiidee Products, Inc.*, the Court of Appeals for the District of Columbia Circuit recently stated that:[46]

> While [the Board's usual bargaining] remedy may provide some bargaining from the date of the order's enforcement, it operates in a real sense so as to be counter-productive, and actually to reward an employer's refusal to bargain during the critical period following a union's organization of his plant. The obligation of collective bargaining is the core of the Act, and the primary means fashioned by Congress for securing industrial peace, *N. L. R. B.* v. *American National Insurance Co.*, 343 U. S. 395, 404 (1952).

To do otherwise would lend "the Board procedures as a tool to thwart the statutory rights of the majority of the employees involved and subverts the very purpose of the Act." 146 NLRB at 1281.

45. The Cox Advisory Panel's report to the Senate Committee on Labor and Public Welfare concluded that a major weakness in labor-management relations law is the long delay between the point at which a union seeks recognition of its majority status and the day when the employees' right to bargain through their chosen representative is vindicated by enforcement of a bargaining order. The Panel posed the question: "If on employer refused to bargain collectively on June 3, 1959, how much good will be done by an order to bargain entered December 1, 1961?". It concluded that "A remedy granted more than 2 years after the event will bear little relation to the human situation which gave rise to the need for Governmental intervention." Pages 2 and 10 of report pursuant to S. Res. 66 and S. Res. 141, 86th Cong., 2d Sess. 81 (1960). A similar conclusion is evident from the testimony given in the hearings before the Special Subcommittee on Labor of the House Committee on Education and Labor on H. R. 11725 (1967) which investigated the adequacy of Board remedies.

46. *Supra* at p. .....

> . . . Employee interest in a union can wane quickly as working conditions remain apparently unaffected by the union or collective bargaining. When the company is finally ordered to bargain with the union some years later, the union may find that it represents only a small fraction of the employees. See Ross, *Analysis of Administrative Process Under Taft-Hartley*, 1966 Labor Relations Yearbook 299, 302-303; Note, *An Assessment of the Proposed 'Make-Whole' Remedy in Refusal-To-Bargain Cases*, 67 Mich. L. Rev. 374, 378 (1968). Thus the employer may reap a second benefit from his original refusal to comply with the law: He may continue to enjoy lower labor expenses after the order to bargain either because the union is gone or because it is too weak to bargain effectively.

A study by Professor Philip Ross shows that a contract is signed in most situations where the employer honors its duty to bargain without delay,[47] but that the chance of a contract being signed is cut in half if the case must go to court enforcement of a bargaining order.[48] In the in-

47. An independent study of UAW experience in obtaining first bargaining contracts during a 6-month period was made by Professor Ross, and its results were appended to the UAW's brief. The study indicates that the UAW succeeded in obtaining contracts in 97 percent of the cases following a Board-conducted election. The contracts resulted in average percentage wage increases of 7.9 percent and an average increase in the value of fringe benefits amounting to 3.9 percent.

48. A study made of 1960 cases in five Board Regional Offices revealed that unions succeeded in gaining contracts in 84 to 90 percent of the cases following their winning Board-conducted elections. Ross, The Government as a Source of Union Power 251 (1965). Professor Ross' more recent study, The Labor Law in Action: An Analysis of the Administrative Process Under the Taft-Hartley Act (1966), considered all 8(a)(5) cases during a 5-year period. Cases concerning first bargaining situations yielded the following conclusions:

> By far, the most significant influence on bargaining consequences was the stage of case disposition. The facts speak for themselves. About two-thirds of cases closed before is-

terim, of course, the employees are deprived of their rightful union representation and the opportunity to bargain over their terms and conditions of employment, while at the same time their employers may gain a monetary advantage over their competitors who have complied with their legal duty.

The present case is but another example of a situation where a bargaining order by itself is not really adequate to remedy the effects of an unlawful refusal to bargain. The Union herein requested recognition on August 3, 1964, and proved that it represented a majority of employees 2½ months later in a Board-conducted election. Nonetheless, since October 1965 the employer, by unlawfully refusing to bargain with the Union, has deprived its employees of their legal right to collective bargaining[49]

suance of complaints resulted in execution of first contracts. . . .

With the exception of a handful of cases which required Supreme Court action prior to closing, the longer the litigation the less likely was the prospect of the signing of a first contract. Only about half (approximately 57 percent) of all cases closed after a Board order resulted in such contracts and less than 36 percent of the cases closed after circuit court enforcement ended up with agreements.

The explanation for these results which comes most readily to mind is the factor of time. The long, drawn out process of administrative investigation, hearing and findings and, ultimately adjudication, bring two, three or four years of delay and a weakening of the charging union through the effects of the unexpunged unfair labor practices upon the employees. . . .

Professor Ross' earlier study revealed that on the average nearly 2½ years elapse between the filing of an unfair labor practice charge and the issuance of a judicial decree. Ross, The Government as a Source of Union Power, at 171.

49. Cf. *N. L. R. B.* v. *Southbridge Sheet Metal Works, Inc.*, 380 F. 2d 851 (C. A. 1). Such delay frustrates the purposes of the Act and leads to strikes and other labor unrest.

through their certified bargaining representative.[50] While a bargaining order at this time, operating prospectively, may insure the exercise of that right in the future, it clearly does not repair the injury to the employees here,

50. We find no merit in the Respondent's contention in the present case that, at least in a "technical" refusal-to-bargain situation, a compensatory remedy would penalize it for obtaining judicial review of the Board's representation proceedings. In *Consolo* v. *Federal Maritime Commission*, *supra* at 624-625, the Court rejected the same contention. Relying on a case involving the Board (*N. L. R. B.* v. *Electric Vacuum Cleaner Company, Inc.*, 315 U. S. 685), the Court concluded that "At any rate it has never been the law that a litigant is absolved from liability for that time during which his litigation is pending." (*Id.* at 624-625) and noted (at 625) that the time of appeal allowed the respondent to continue its unlawful conduct thus in turn continue to injure the petitioner. That such a remedy would include the entire amount lost by the wronged party, instead of being reduced by the amount accruing while the violator was contesting the issue, no more makes the remedy penal in character under this Act than it does elsewhere. "The litigant must pay for his experience, like others who have tried and lost." *Life & Casualty Ins. Co.* v. *McCray*, 291 U. S. 566, 575.

There is no question of the right of an employer to test the legal propriety of a Board certification or to test its legal position respecting any issue of law or fact upon which a Board bargaining order is predicted; but it should not thereby realize benefits not usually flowing from such a proceeding. In other words, should an employer choose to await court action, and if its legal position be sustained, it would not only be absolved of the duty to bargain, but also of any monetary remedy arising out of the order contemplated herein; if, on the other hand, an employer be found to have rested its refusal to bargain on an erroneous view of law or fact, any loss to employees incurred by its continued adherence to that error should be borne by that employer and not by its employees. That is the risk taken by all litigants.

The employer's argument for tolling the compensatory period during the time he contest the violation is contrary to the policy of the Act in fostering the prompt commencement of collective bargaining, a policy shown explicitly in the denial of judicial review of the Board's representation proceedings. To allow the employer to avoid making his employees whole for the period bargaining was delayed by his litigating a mistaken view of the law would encourage such delay in the areas in which Congress particularly deemed speed to be essential.

caused by the Respondent's denial of their rights during the past 5 years.

In these refusal-to-bargain cases there is at least a legal injury. Potential employee losses incurred by an employer's refusal to bargain in violation of the Act are not limited to financial matters such as wages. Thus, it is often the case that the most important employee gains arrived at through collective bargaining involve such benefits as seniority, improved physical facilities, a better grievance procedure, or a right to arbitration. Therefore, even the remedy we would direct herein is not complete, limited as it is to only some of the monetary losses which may be measured or estimated. The employees would not be made whole for all the losses incurred through the employer's unfair labor practice. But, where the legal injury is accompanied by financial loss, the employees should be compensated for it. The compensatory period would normally run from the date of the employer's unlawful refusal to bargain until it commences to negotiate in good faith, or upon the failure of the Union to commence negotiations within 5 days of the receipt of the Respondent's notice of its desire to bargain with the Union,[51]

51. It is argued that the remedy contemplated should not be computed from the beginning of the Employer's refusal to bargain since collective-bargaining contracts are usually not agreed upon immediately upon the inception of a duty to bargain. However, an order that liability shall cease when the Respondent *commences* to bargain, not when an agreement is achieved, negates any such argument for a delayed date of liability. For, the period between commencement of bargaining and agreement would be provided for at the end of the liability period rather than at the beginning. In addition to providing beginning and ending dates more precise and less conjectural, a computation on such a basis has the added advantage of permitting the employer to accept its basic responsibility to bargain and thereby toll the accrual of reimbursable losses and leave it free actually to bargain without added pressure to reach a contract in order thereby to minimize its monetary liability, thus fostering collective bargaining without compelling agreement.

although here a later starting date could be used because this remedy would be a substantial departure from past practices.[52] Further, the Board could follow its usual procedure of providing a general reimbursement order with the amount, if any, to be determined as part of the compliance procedure.[53]

This type of compensatory remedy is in no way forbidden by Section 8(d).[54] It would be designed to compensate employees for injuries incurred by them by virtue

52. Cf. *Fibreboard Paper Products Corp.* v. *N. L. R. B.*, *supra* at fn. 22.

53. As Mr. Justice Frankfurter said, concurring in *N. L. R. B.* v. *Deena Artware, Inc.*, 361 U. S. 398, which also involved a compensatory remedy:

> The Board's procedure in unfair labor practice cases is first to hold a hearing to determine whether an unfair labor practice was committed, and, if it was, whether it would "effectuate the policies of the Act" for the Board to order reinstatement with backpay of any employees who were discharged. Section 10(c). In such a proceeding, the Board does not concern itself with the amount of backpay actually owing. This is excluded from the proceeding in the interest of the efficient administration of the Act. . . . [The Board's] primary function under Section 10, in connection with which it makes specific monetary orders for specific employees, is to prevent the conduct defined as unfair labor practices in Section 8. Section 10(c) provides that once the Board determines that an unfair labor practice occurred, it may make such remedial orders for reinstatement with backpay as will "effectuate the policies" of the Act. We have held that the Board is granted broad discretion over the fashioning of remedial orders by this provision. . . . The salient fact which brings the Board's remedial power into play under Section 10(c) is its finding that the employer's conduct constituted an unfair labor practice. . . . [361 U. S. at 411-412].

54. The provision in Section 8(d) that neither party is required to agree to a proposal or make a concession appears to have been designed, not for the situation before us, but to preclude the Board from evaluating "the merits of the provisions of the parties" as a factor in determining whether bargaining was in good faith. House Conference Report, Legislative History, p. 538.

caused by the Respondent's denial of their rights during the past 5 years.

In these refusal-to-bargain cases there is at least a legal injury. Potential employee losses incurred by an employer's refusal to bargain in violation of the Act are not limited to financial matters such as wages. Thus, it is often the case that the most important employee gains arrived at through collective bargaining involve such benefits as seniority, improved physical facilities, a better grievance procedure, or a right to arbitration. Therefore, even the remedy we would direct herein is not complete, limited as it is to only some of the monetary losses which may be measured or estimated. The employees would not be made whole for all the losses incurred through the employer's unfair labor practice. But, where the legal injury is accompanied by financial loss, the employees should be compensated for it. The compensatory period would normally run from the date of the employer's unlawful refusal to bargain until it commences to negotiate in good faith, or upon the failure of the Union to commence negotiations within 5 days of the receipt of the Respondent's notice of its desire to bargain with the Union.[51]

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of the unfair labor practices and would not require the employer to accept the measure of compensation as a term of any contract which might result from subsequent collective bargaining. The remedy contemplated in no way "writes a contract" between the employer and the union, for it would not specify new or continuing terms of employment and would not prohibit changes in existing terms and conditions.[55] All of these would be left to the outcome of bargaining, the commencement of which would terminate Respondent's liability.

Furthermore, this compensatory remedy is not a punitive measure. It would be designed to do no more than reimburse the employees for the loss occasioned by the deprivation of their right to be represented by their collective-bargaining agent during the period of the violation. The amount to be awarded would be only that which would reasonably reflect and be measured by the loss caused by the unlawful denial of the opportunity for collective bargaining. Thus, employees would be compensated for the injury suffered as a result of their employer's unlawful refusal to bargain, and the employer would thereby be prohibited from enjoying the fruits of its forbidden conduct to the end, as embodied in the Act, that collective bargaining be encouraged and the rights of injured employees be protected.[56] It is fell settled that a reimburse-

55. It is in this respect that this situation is distinguishable from the one that was before the Supreme Court in *H. K. Porter Co., Inc.* v. *N. L. R. B.*, 397 U. S. 99, which involved a dispute over a contract clause. See *I. U. E.* [*Tiidee Products, Inc.*] v. *N. L. R. B.*, *supra*.

56. *Local 57, International Ladies' Garment Workers' Union, AFL-CIO* v. *N. L. R. B.*, [*Garwin Corp.*], 371 F. 2d 295 (C. A. D. C.), cert denied 387 U. S. 942, where the court of appeals, in refusing to enforce part of a Board order on the ground that it constituted a penalty, said that:

> The Board is indeed correct when it states that the purpose of a remedy must be restoration of the *status quo* to the greatest extent practicable; however, the basic purpose of restoring

ment order is not a redress for a private wrong, since the Act does not create a private cause of action for damages,[57] but is a remedy created by statute and designed to aid in the achievement of the public policy embodied in the Act.[58] Accordingly, as the reimbursement order sought herein is meant to enforce public policy, the Board's exercise of its discretion in ordering such a remedy would not be strictly confined to the same considerations which govern comparable awards in either equity courts[59] or damage awards

> the *status quo* is to redress the injury done to employees. . . . The crucial element in all these cases is that the interest being protected is the freedom of choice of the workers in a bargaining unit. . . . [T]he purpose of Board remedies is to rectify the harm done to the injured workers, not to provide punitive measures against errant employers. [374 F. 2d at 300-303]

57. See, e.g., H. R. Rep. No. 1147 on S. 1958 24 (1935); *Virginia Electric and Power Company* v. *N. L. R. B.*, fn. 22, *supra* at 744; *International Brotherhood of Operative Potters* v. *N. L. R. B.*, fn. 21, *supra* at 761.

58. In upholding the Board's *Woolworth* formula, the Supreme Court stated that:

> It is the business of the Board to give coordinated effect to the policies of the Act. We prefer to deal with these realties and to avoid entering into the bog of logomachy, as we are invited to, by debate about what is "remedial" and what is "punitive." It seems more profitable to stick closely to the direction of the Act by considering what order does, as this does, and what order does not, bear appropriate relation to the policies of the Act. [*N. L. R. B.* v. *Seven-Up Bottling Company*, fn. 31, *supra* at 348.]

59. "For this reason it is erroneous to characterize this reimbursement order as penal or as the adjudication of a mass tort. It is equally wrong to fetter the Board's discretion by compelling it to observe conventional common law of chancery principles in fashioning such an order, or to force it to inquire into the amount of damages actually sustained. Whether and to what extent such matters should be considered is a complex problem for the Board to decide. . . . The fact that the Board may only have approximated its efforts to make the employees whole . . . does not convert this reimbusement into the imposition of a penalty." *Virginia Electric and Power Company* v. *N. L. R. B.*, fn. 22, *supra* at 543-554; see also *Phelps Dodge Corp.* v. *N. L. R. B.*, fn. *supra* at 188; *F. W. Woolworth Company* v. *N. L. R. B.*, 121 F. 2d 658 (C. A. 2).

in legal actions.[60] In the first place, it is well established that, where the defendant's wrongful act prevents exact determination of the amount of damage, he cannot plead such uncertainty in order to deny relief to the injured person, but rather must bear the risk of the uncertainty which was created by his own wrong.[61] The Board is often faced with the task of determining the precise amount of a make-whole order where the criteria are less than ideal, and has successfully resolved the questions presented.[62]

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60. See, e.g., *N. L. R. B.* v. *Deena Artware Inc.*, fn. 53; *supra* at 413, where Mr. Justice Frankfurter, concurring, said that:

> The Board's determinations are not merely administrative analogues of common-law judgments and they do not purport to be. As here, they uniformly contain a specific direction to take "affirmative action." In enforcing the Board's orders the Courts of Appeals similarly act not merely to review a common-law judgment, but to "effectuate the policies" of the National Labor Relations Act. . . .

61. *Story Parchment Co.* v. *Paterson Parchment Co.*, 282 U. S. 555, 563. When reaffirming this principle in *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251, 265, the Supreme Court relied on *F. W. Woolworth Company* v. *N. L. R. B.*, 121 F. 2d 658 (C. A. 2). The court of appeals in that case enforced the Board's backpay order even though, because of the employer's conduct, it could not be determined which employees were discriminatorily discharged, and stated that:

> In this striving to restore the *status quo*, the Board was forced to use hypothesis and assumption instead of proven fact. But its order is not invalid on that account; for Petitioner, by its unlawful conduct, has made it impossible to do more than to approximate the conditions which would have prevailed in the absence of discrimination. . . . Even in private litigation, the courts will not impose an unattainable standard of accuracy. Certainly in the fact of damages is essential. Certainly as to the amount goes no further than to require a basis for a reasonable conclusion.

The same principle has been applied to a backpay award granted to remedy a violation of Section 8(a)(5) in *Leeds & Northrup Co.* v. *N. L. R. B.*, *supra* (see statement quoted at pp. 27-28 above.

62. The problem most frequently arises when we must determine the amount of backpay due to unlawfully discharged employees. As we recently stated in connection with this issue (*The*

But even if a reimbursement order were judged by legal or equitable principles regarding damages, the remedy would not be speculative. It is well established that the rule which precludes recovery of "uncertain damages" refers to uncertainty as to the fact of injury, rather than to the amount.[63] Where, as here, the employer has deprived its employees of a statutory right, there is by definition a legal injury suffered by them, and any uncertainty concerns only the amount of the accompanying reimbursable financial loss.

From a remedial viewpoint, the present type of refusal to bargain differs from other 8(a)(5) situations where reimbursement has been ordered only in the method of proof needed to calculate the amount of financial loss, if any, which the employees may have suffered. In the cases involving employer refusals to sign agreements already reached, the employees' losses were compensated according to the terms of such agreement for the length of the delay in its effectuation caused by the employer.[64] Where

Buncher Company, 164 NLRB 340, enfd. 405 F. 2d 787 (C. A. 3)):

> In solving many of the problems which arise in backpay cases, the Board occasionally is required to adopt other formulas which result in backpay determinations that are close approximations because no better basis exists for determining the exact amount due. However, the fact that the exact amount due is incalculable is no justification for permitting the Respondent to escape completely his legal obligation to compensate the victims of his discriminatory actions for the loss of earnings which they suffered. In general, courts have acknowledged that in solving such backpay problems, the Board is vested with wide discretion in devising procedures and methods which will effectuate the purposes of the Act and has generally limited its review to whether a method selected was "arbitrary or unreasonable in the circumstances involved," or whether in determining the amount, a "rational basis" was utilized.

63. *Story Parchment Co.* v. *Paterson Parchment Co.*, *supra*.

64. E.g., cases cited in fn. 35, *supra*.

the employer unilaterally discontinued a Christmas bonus, the amount of employee loss was determined by utilizing the past records of bonuses given and the methods by which they were previously calculated.[65] In the recent case,[66] a union and a multiemployer bargaining association successfully bargained to a contract. The employer subsequently refused to sign the contract and attempted to withdraw from the multiemployer bargaining association. The Board found a violation of Section 8(a)(5) and ordered the employer to cease and desist from unfair labor practices, to sign the contract, and to pay the fringe benefits provided for in that contract. The court of appeals had agreed with the Board's finding of a violation and its order to cease and desist from violation and to sign the contract, but refused to enforce that part of the Board's order requiring the Respondent to pay the contractual fringe benefits as being outside the Board's powers. The Supreme Court, on writ of *certiorari*, affirmed the Board order *in toto*, finding that the provision ordering the Respondent to pay the contractual fringe benefits was within the Board's remedial power granted in Section 10(c) of the Act. In situations of unlawful unilateral discontinuance of part of an operation,[67] the compensation is based upon the wage rates previously earned by the injured employees. It may be noted that the Supreme Court upheld the order in *Fibreboard* even though the amount

65. *Leeds & Northrup Co.* v. *N. L. R. B.*, *supra*; *American Fire Apparatus Co.*, fn. 36, *supra*. The court of appeals, in enforcing the order in the latter case, stated that:

> . . . the only question is whether the Board can fairly arrive at the loss, and such determination on the part of the Board may not judicially be required to rest upon any greater degree of certainty as to amount than that applicable to the contract or statutory breaches generally. [380 F. 2d at 1006.]

66. *N. L. R. B.* v. *Joseph T. Strong, d/b/a Strong Roofing & Insulating Co.*, *supra*.

67. *Fibreboard Paper Products Corp.* v. *N. L. R. B.*, *supra*.

of actual loss might be deemed speculative because it was not shown that had the employer bargained lawfully it would not have contracted out the work and discharged the employees.

As previously indicated, the injury suffered by employees is predicated upon the employees' being deprived of the right to collective bargaining as required by the Act. The burden of proof would be upon the General Counsel at the compliance stage to translate that legal injury into terms of measurable financial loss, if any, which the employees might reasonably be found to have suffered as a consequence of that injury.

A showing at the compliance stage by the General Counsel or Charging Party by acceptable and demonstrable means that the employees could have reasonably expected to gain a certain amount of compensation by bargaining would establish a *prima facie* loss, and the Respondent would then be afforded an opportunity to rebut such a showing. This might be accomplished, for example, by adducing evidence to show that a contract would probably not have ben reached, or that there would have been less or no increase in compensation as a result of any contract which might have been signed.

Accordingly, uncertainty as to the amount of loss does not preclude a make-whole order proposed here, and some reasonable method or basis of computation can be worked out as part of the compliance procedure. These cannot be defined in advance, but there are many methods for determining the measurable financial gain which the employees might reasonably have expected to achieve, had the Respondent fulfilled its statutory obligation to bargain collectively. The criteria which prove valid in each case must be determined by what is pertinent to the facts. Nevertheless, the following methods for measuring such

loss do appear to be available, although these are neither exhaustive nor exclusive. Thus, if the particular employer and union involved have contracts covering other plants of the employer, possibly in the same or a relevant area, the terms of such agreements may serve to show what the employees could probably have obtained by bargaining.[68] The parties could also make comparisons with compensation patterns achieved through collective bargaining by other employees in the same geographic area and industry.[69] Or the parties might employ the national average percentage changes in straight time hourly wages computed by the Bureau of Labor Statistics.

And there is other available significant data which may be utilized to indicate the value of the lost collective-bargaining opportunity. For example, the Bureau of Labor Statistics conducts an annual study of union scales in the building construction, local transit, local trucking, and printing industries. This study covers all local unions in 68 selected cities. BLS similarly makes a quarterly wage survey of seven major construction trades in 100 selected cities. The Bureau also issues monthly reports of wage

68. As an example, the Union here presented evidence of the collective-bargaining agreements it had negotiated with Ex-Cell-O at five of its other plants in nearby States.

69. Data customarily cited by companies and unions in negotiations, according to the study by the National Industrial Conference Board, "Preparing for Collective Bargaining," pp. 60 and 65, tables 2 and 6, could also assist in making the determination. The company lists include settlements negotiated by other firms in company's industry; settlements negotiated by union with which company deals; settlements in company's immediate job area; settlements negotiated by big companies; settlements negotiated by subsidiaries of parent company; settlements negotiated by related industries, such as suppliers; settlements negotiated with other unions, etc. The union lists include settlements by other companies within the jurisdiction of the union; settlements in the immediate job market area of the firm with which the union is dealing; settlements negotiated by the big companies; and miscellaneous.

and benefit changes under collective-bargaining agreements in manufacturing establishments employing 1,000 or more production and related workers. A related survey of wage developments in smaller manufacturing units covers both unionized and nonunionized establishments. There are other Bureau of Labor Statistics facts which may bear on the remedy. One of significance is the periodic wage and benefits survey of 50 manufacturing and 20 nonmanufacturing industries. The data collected in this program reports on about 20 million employees on both a national and regional basis, usually with listings by size of establishment, size of community, collective-bargaining coverage, and type of product or plant group. Another Bureau of Labor Statistics program periodically gathers wage and benefits data on a Standard Metropolitan Statistical Area basis for more than 60 occupational categories in all but the smallest establishments. Depending on the type of industry, these surveys cover from 8 to 72 metropolitan areas.[70] Guidance may also be forthcoming, on occasion, from other forms of data frequently cited in the collective-bargaining process[71] such as Consumer Price Indices and productivity statistics. Other relevant wages and benefit information will be available to the General Counsel and the parties from private sources and their

70. All of the foregoing programs of fact gathering and analysis are described in detail in Bureau of Labor Statistics, Handbook of Methods for Survey and Studies (1966).

71. Measuring the amount of loss calls for a knowledge of pay rates in the industry and area for comparable jobs, a detailed understanding of the pay rates in Respondent's plant and increases therein during the period when compensation may have been accruing, and like specialized technical matters.

Employers and unions are well equipped by their specialized knowledge and experience to deal with these matters. Indeed, from time to time, they have been able to resolve the amounts due in large, complex backpay cases following Board orders remedying unfair labor practice discharges, etc., by negotiation for the approval of the regional Directors.

use and usefulness in the compliance process will likely vary with the particular circumstances of the individual case. Furthermore, additional data could become available through new compilations which might later be undertaken by the Bureau of Labor Statistics or other agencies, including this agency, as well as by unions, employers, and private and public organizations and institutions.

In the instant case, as noted above, a *prima facie* showing of loss can readily be made out by measuring the wage and benefit increments that were negotiated for employees at Respondent's other organized plants against those given employees in this bargaining unit during the period of Respondent's unlawful refusal to bargain. Granted that the task of determining loss may be more difficult in other cases where no similar basis for comparison exists, this is not reason enough for the Board to shirk its statutory responsibilities,[72] and no reason at all for it to do so in a case such as this where that difficulty is not present.

For the reasons set out above, we would order the Employer to make its employees whole for their measurable losses, if any, resulting from the unlawful refusal to bargain. We dissent from the Decision of the Board to the extent that it fails to direct such a remedy.

Dated, Washington, D. C.

FRANK W. MCCULLOCH, *Member*
GERALD A. BROWN, *Member*
NATIONAL LABOR RELATIONS BOARD

(SEAL)

72. As the Board was reminded by the court, in the *Tiidee Products* case,

> A tribunal given the function of implementing national policy through compensatory remedies may not soundly refer to the difficulty in qualifying appropriate compensation as a justification for the withdrawal and frustration of the policy. . . .

APPENDIX

Notice To Employees

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL, upon request, recognize and bargain collectively with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, as the exclusive representative of all our employees in the appropriate bargaining unit. The bargaining unit is:

> All production and maintenance employees, including tool crib store employees, shipping and receiving and follow-up employees, but excluding all office clerical and plant clerical employees, all professional employees, guards, and supervisors.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7 of the Act.

WE WILL bargain collectively, on request, with the above-named Union as the exclusive representative of the employees in the unit described above with respect to rates of pay, wages, hours of employment, and other conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

EX-CELL-O CORPORATION
(Employer)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 614 ISTA Center, 150 West Market Street, Indianapolis, Indiana 46204, Telephone 317-633-8921.

SUPREME COURT, U. S.

SEP 4 1970

E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 654

TIDEE PRODUCTS, INC.,

Petitioner,

and

NATIONAL LABOR RELATIONS BOARD,

vs.

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on May 18, 1970.

OPINIONS BELOW

The decision and order of the National Labor Relations Board is reported at 174 NLRB No. 103 and is printed in Appendix B, *infra*, pp. 2a-4a. The judgment and opinion of the Court of Appeals are not yet officially reported and are printed in Appendix B, *infra*, pp. 46a-70a.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on April 3 and May 18, 1970, respectively. Appendix B, *infra*, pp. 46a-70a. Rehearing was denied on July 10, 1970. Appendix B, *infra*, p. 72a. Petitioner's Motion for leave to File Second Petition for Rehearing (Appendix B, *infra*, pp. 75a-76a) is presently pending before the court. Issuance of the mandate was stayed by order of the Court of Appeals for a period of 30 days from August 7, 1970. Appendix B, *infra*, p. 74a. The jurisdiction of this Court is now invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED

If the National Labor Relations Board is without the remedial power to "compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement" (*H. K. Porter Company* v. *NLRB*, 397 U. S. 99, 90 S. Ct. 821 (March 2, 1970)), may the Board nevertheless award damages upon the contractual provisions that it speculates the parties would have agreed to had they entered into a collective bargaining agreement?

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. § 151, *et seq.*), which are involved in this case are set forth in Appendix A. For the convenience of the Court, however, the pertinent provisions of Section 8(d) of the Act are set forth below:

> "For the purposes of this section, to bargain collectively is the performance of the mutual obligation

> of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . *but such obligation does not compel either party to agree to a proposal or require the making of a concession.* . . ." (Emphasis added.)

STATEMENT OF THE CASE

The judgment and opinion, of which review by this Court is now sought, was part of a consolidated decision by the Court of Appeals. In the portion *not* here involved (Case No. 22,911), the court enforced an order of the National Labor Relations Board (hereinafter referred to as the "Board") finding that Tiidee Products, Inc. (hereinafter referred to as the "Company") had violated Sections 8(a)(1), (3) and (5) of the National Labor Relations Act. The violation of Section 8(a)(5) consisted of an improper refusal to bargain with the International Union of Electrical, Radio and Machine Workers, AFL-CIO (hereinafter referred to as the "Union").[1] This violation was remedied by the Board through an order requiring the Company to cease and desist from such unlawful conduct, to bargain with the Union, to post an appropriate notice and to engage in other affirmative acts designed to correct the Company's unfair labor practices. In addition, the Board also issued a so-called "broad order" forbidding the Company from "in any other manner interfering with, restraining or coercing its employees in the exercise of the

1. The refusal to bargain originated in the Company's initial belief—not subsequently urged before the Court of Appeals—that the Board's Regional Director had acted improperly in overruling the Company's objections to the Union's election victory. Appendix B, *infra*, pp. 7a-11a. A refusal to bargain constituted the *only* means by which the Company could obtain judicial review of the Regional Director's decision. See, e.g., *Boire* v. *Greyhound Corp.*, 376 U. S. 473, 481 (1964).

rights guaranteed them by Section 7 of the Act". Appendix B, *infra*, pp. 4a, 39a-45a. The Company has agreed to comply with this order of the Board. Appendix B, *infra*, pp. 77a-78a.

The Union, however, requested still additional relief for the Company's 8(a)(5) violation in the form of a further order requiring the Company to make payments to its employees and to the Union based upon speculative assumptions that (1) a collective bargaining agreement would have been consummated, (2) that such a contract would have been consummated at a certain fixed date from certification of the Union's election victory, and (3) that the agreement would have contained certain specific terms and conditions. The Board Trial Examiner refused to recommend this so-called "make-whole" claim, and the Board affirmed his findings and recommendations and denied the Union's request in its entirety. Appendix B, *infra*, pp. 2a-4a, 37a-39a.

The present case (Case No. 22,797 below) arises out of the Union's petition to obtain the additional relief which the Board declined to grant. One significant authority urged on behalf of this position was the decision of the Court of Appeals for the District of Columbia in *United Steelworkers of America* v. *N. L. R. B. (H. K. Porter Company)*, 389 F. 2d 295 (1967). Union's Brief in the Court of Appeals, p. 10. Although in the interval between oral argument and decision this Court reversed the Appellate Court's decision in *Porter*, the Court of Appeals, Circuit Judge MacKinnon dissenting, nevertheless concluded that "the Union makes a substantial contention"; that notwithstanding *Porter* and Section 8(d) of the Act, "damages can be awarded on an assessment of the contract terms that would have been in effect if the law had been complied with even though the law-violating employer has not yet entered into the contract"; and that the Union's petition

for additional relief should therefore be remanded to the Board "for further proceedings not inconsistent with this opinion." Appendix B, *infra*, pp. 52a, 62a.

The Company was subsequently made a party intervenor in the present case (Appendix B, *infra*, p. 71a) and submitted a petition for rehearing, and suggestion for rehearing *en banc*, attacking the Court of Appeals' findings on the basis, *inter alia*, of its lack of opportunity to even argue *Porter*. The petition, supported by an *amicus* brief filed on behalf of The Chamber of Commerce of the United States of America, was denied, Circuit Judge MacKinnon again dissenting, on July 10, 1970 and counsel for the Company was simultaneously informed that a majority of the Judges of the court were not in favor of having the case heard *en banc*. Appendix B, *infra*, pp. 73a.

Thereafter, in a decision dated August 25, 1970 and made public on August 29, 1970, the National Labor Relations Board issued its landmark opinion in *Ex-Cell-O Corporation*, 185 NLRB No. 20; *appeal docketed sub. nom. Automobile Workers* v. *NLRB*, No. 24577, D. C. Cir., August 26, 1970. Appendix C, *infra*. In that case the Board expressly disagreed with the decision below and concluded that, by virtue of *Porter* and Section 8(d) of the Act, it had no power under any circumstances to grant the additional 8(a)(5) relief sought by the Union herein. On the basis thereof the Company immediately filed with the Court of Appeals a Motion for Leave to File Second Petition for Rehearing and for Enlargement of Time to File Petition for Rehearing. Appendix B, *infra*, pp. 75a-76a. This motion is presently pending before the court.

REASONS FOR GRANTING THE WRIT.

1. The Decision Below Creates a Severe Dislocation in the Administration of the National Labor Relations Act.

The decision of the Court of Appeals sanctions the Union's requested "make-whole" relief and instructs the Board to enter an order "not inconsistent" with the court's opinion. Appendix B, *infra*, p. 62a. The Board, however, has already determined that such a remedy is inappropriate here[2] and that, *in any case*, with "due respect for the opinion of the Court of Appeals . . . as the law now stands, [such a] proposed remedy is a matter for Congress, not the Board." *Ex-Cell-O Corporation*, 185 NLRB No. 20; *appeal docketed sub. nom. Automobile Workers* v. *NLRB*, No. 24577, D. C. Cir., August 26, 1970. Appendix C, *infra*, pp. 86a-89a. The court, in effect, thus continues to insist that the Board utilize a purported "make-whole" power although the Board has concluded that both Congress and this Court have precluded the imposition of such a remedy.

Such a severe dislocation in the administration of the Act warrants resolution by this Court. The instant case is only a precursor of other decisions by the District of Columbia Circuit. Review of the Board's *Ex-Cell-O* opinion by that Court was immediately sought by the union there involved. Case No. 24577, D. C. Cir., August 26, 1970. Other allegedly aggrieved unions that have failed to obtain a "make-whole" remedy before the Board will

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2: Appendix B, *infra*, pp. 2a-4a, 37a-39a. The Board here has consistently opposed the issuance of any additional remedies and insisted instead "that where the Board declines to afford a remedy other than what it traditionally grants, the refusal constitutes a determination that the facts of a particular case do not warrant it, and no further explanation is required". Brief of NLRB to the Court of Appeals, pp. 37-38.

similarly continue to reassert such claims before that Circuit,[3] regardless of *any* disposition by the Board on remand here, until this Court alleviates the impasse that exists between the Board and the court below.[4]

This attempt to procure judicial approval of remedial provisions which the Board has declined to grant flies in the face of this Court's declarations that the Board's choice of remedy must "be given special respect by reviewing courts" (*NLRB* v. *Gissel Packing Co.*, 395 U. S. 575, 612 at n. 32 (1969)) and that "as with the Board's other remedies, the power to order backpay 'is for the Board to wield, not for the courts' ". *NLRB* v. *J. H. Rutter-Rex Manufacturing Company*, 396 U. S. 258, 90 S. Ct. 417, 420 (1969), quoting *NLRB* v. *Seven-Up Bottling Co.*, 344 U. S. 344, 346 (1953). Surely such admonitions are particularly apropos where, as here, the underlying violation of the Act involves the only means whereby the employer can obtain appellate review of a Board representation case decision. As the Board observed in *Ex-Cell-O* (Appendix C, *infra*, p. 85a), the remedy sanctioned by the decision below has the practical effect of eliminating many employers' right to obtain court review of such Board determinations; the employer is confronted with the Scylla and Charybdis choice of either accepting without question such a Board ruling or incurring the risk of a speculative and

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3. Section 10(f) of the Act provides, in part, that "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain review of such order . . . in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. . ."

4. See, e.g., *Local No. 347, Amalgamated Meat Cutters* v. *NLRB (Heck's, Inc.)*, . . . F. 2d . . . , 74 LRRM 2109 (D. C. Cir., 1970), where the Circuit remanded to the Board another case to consider, in view of its decision in the present case, a "make-whole" remedy. Cf. *Steelworkers* v. *NLRB (Quality Rubber Mfg. Co., Inc.)*, . . . F. 2d . . . , 74 LRRM 2747 (D. C. Cir., 1970).

oppressive penalty for invoking his only available judicial recourse.[5]

Moreover, a remand of the present case serves no useful purpose and operates to the substantial detriment of Petitioner. If the Board has no authority *whatsoever* to grant a "make-whole" remedy, how can it proceed in accord with the decision below which approves such a remedy? And what obligation can there be, particularly after *Ex-Cell-O*, for the Board to provide the court with a "satisfactory justification for its order" and an explanation of "what basis it could or did conclude that its order . . . is designed 'to insure meaningful bargaining'" (Appendix B, *infra*, pp. 52a, 53a)? In sum, upon remand, if the Board is to be consistent with *Ex-Cell-O*, it will necessarily have to disagree, in substantial part, with the Circuit's views on the critical questions here involved. Recourse will then again be sought to the Court of Appeals and ultimately to this Court with little intervening illuminating assistance. There will be a repetition of the unhappy judicial history of *Porter*. Such expensive and time-consuming litigation, and "unnecessary duplication of proceedings", is anathema to the purpose of judicial review of securing "a just result with a minimum of technical requirements". *United Automobile Workers* v. *Scofield*, 382 U. S. 205, 212 (1965). The instant matter is now

5. Little solace can be gained for the decision below by that Court's conclusion that review of the Board representation decision here was totally unwarranted. "Lawsuits", as this Court noted in *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 51-2 (1938): ". . . often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact." If the inevitable delays attendant in a review proceeding suspend for a time employees' enjoyment of some of their statutory rights, "it is . . . obvious that Congress explicitly intended to impose precisely such delays." *Boire* v. *Greyhound Corp.*, *supra*, 376 U. S. at 477-8; *American Federation of Labor* v. *NLRB*, 308 U. S. 401, 409-12 (1940).

in an appropriate posture for this Court to provide the necessary guidance for the court below, and other courts of appeal, on the legitimate scope of the Board's remedial powers.

2. The Decision Below Is in Conflict With This Court's Decision in Porter.

In the present case, as in *Porter*, the remedy sought is one which has never previously been granted in the thirty-five year history of the Act. The reason is apparent: such a sanction would sharply erode the fundamental premise of freedom of contract upon which our national labor policy is grounded. *Porter*, 90 S. Ct. at 826. For if the Board has the power to award damages against an employer based upon a determination of what that employer "*would have* agreed to if [he] had engaged in . . . [proper] collective bargaining" (Appendix B, *infra*, p. 61a; Emphasis added), it also has the power to determine, in numerous other contexts, the outcome of collective bargaining.[6] It is precisely this governmental power to "impose its own views of a desirable settlement", to "directly or indirectly . . . sit in judgment upon the substantive terms of collective bargaining agreements", and to "compel agreement

6. A "make-whole" remedy would necessarily involve the Board in an intricate analysis of the bargaining positions of the parties and a concomitant regulation of contractual terms and conditions. See, e.g., "the methods for measuring loss" discussed by the Board dissenters in *Ex-Cell-O*. Appendix C, *infra*, pp. 115a-118a. As Professor St. Antoine observed:

> "As a practical matter, [a "make-whole" remedy] . . . would in all likelihood tend to have a significant impact on the terms of any contract subsequently negotiated by the parties. The union will inevitably want to regard the scale by which the 'make-whole' award was calculated as its 'floor' in bargaining."

St. Antoine, *A Touchstone for Labor Remedies*, 14 Wayne L. Rev. 1039, 1054 (1968), cited with approval by the court below. Appendix B, *infra*, pp. 56a, 59a.

when the parties themselves are unable to do so", which *Porter* expressly barred. *Porter*, 90 S. Ct. at 826.

If the Board was without the authority in *Porter* to compel a "recalcitrant" employer to accept a single and definite contractual provision, where the circumstances of the case indicated that such a clause would almost certainly have been obtained but for the employer's unlawful conduct, it is surely also without the authority in the present case to predicate damages on the benefits that allegedly would have resulted from collective bargaining. Awarding damages "on an assessment of the contract terms that would have been in effect" (Appendix B, *infra*, p. 62a) necessarily presumes, as the Board observed in *Ex-Cell-O*, that "a contract would have resulted from bargaining. The fact that the contract, so to speak, is 'written in the air' does not diminish its financial impact upon the recalcitrant employer, who, willy nilly, is forced to accede to terms never mutually established by the parties. Despite the admonition of the Supreme Court . . . one of the parties under this remedy is forced by the Government to submit to the other side's demands." Appendix C, *infra*, p. 88a.

3. The Decision Below Is in Conflict With the Intent of Congress.

"A sanction for refusal to bargain," Judge Friendly observed in *Cooper Thermometer v. N. L. R. B.*, 376 F. 2d 684, 690 (2nd Cir. 1967), "that would treat the guilty party as if he had agreed to what the other party demanded although the evidence shows he would have done nothing of that sort would give insufficient respect to Congress' direction in Sec. 8(d) that the obligation to bargain does not compel either party to agree to a proposal or require the making of a concession."

Such an improper sanction has been approved by the decision below. The remedy which the Court of Appeals would permit disregards both the remarks of Senator Taft

during the Congressional debates on the Taft Hartley amendments to the Act ("Under the bill there is a kind of injunctive remedy through the National Labor Relations Board, *but there is no possibility of a suit for damages* . . . it is not felt . . . that the Labor Board is an effective tribunal for the purposes of trying to assess damages in such a case" 93 Cong. Rec. 1858 (1947) (Emphasis added)) and the observations of this Court in *United Construction Workers v. Laburnum Corp.*, 347 U. S. 656, 665 (1954) ("The Labor Management Relations Act sets up no general compensatory procedure except in such minor supplementary ways as the reinstatement of wrongfully discharged employees with back pay"). In short, as Judge MacKinnon noted in his dissent, "[t]he power the majority opinion seeks to have the Board apply has been expressly withheld by Congress." Appendix B, *infra*, pp. 68a-69a.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

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SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

On September 4, 1970, Petitioner filed with this Court its Petition for Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on April 3 and May 18, 1970, respectively. The Petition was filed at that time so that issuance of the mandate, which had been stayed by order of the Circuit Court only for a period of 30 days from August 7, 1970 (Appendices to Petition, p. 74a), would be further stayed under Rule 41(b), Federal Rules of Appellate Procedure.

At the time the Petition was filed, as noted therein (pp. 2, 5), there was pending before the Court of Appeals

Petitioner's Motion of September 1, 1970 for Leave to File Second Petition for Rehearing (Appendices to Petition, p. 75a) predicated upon the Board's decision, made public August 29, 1970, in *Ex-Cell-O Corporation*, 185 NLRB No. 20, *appeal docketed sub. nom. Automobile Workers* v. *NLRB*, No. 24577,[1] D. C. Cir., August 26, 1970 (Appendices to Petition, pp. 79a-120a).

By an order dated September 21, 1970, appended hereto, the Circuit Court, Circuit Judge MacKinnon dissenting, has now denied Petitioner's Motion. This order has a number of significant implications with respect to the instant Petition:

1. The Court of Appeals' order directly invites a Supreme Court resolution on the conflict between the decision below and *Ex-Cell-O*. Thus, the court declines to recall its decision, notwithstanding its recognition that the Board has now expressly considered the precise issue involved in that decision and reached a contrary interpretation of the law, on the ground that "[t]he question whether this court was in error has been presented to the Supreme Court".

2. The Court of Appeals' order underscores the severe dislocation in the administration of the National Labor Relations Act effected by the decision below. See Petition, pp. 6-8. Thus, while the court is cognizant that *Ex-Cell-O* "sets forth the Board's view of the legal question passed upon by this court, concerning the extent of its authority, and concludes that this court was in error", it nevertheless refuses to regard that decision as "the kind of supplementary finding contemplated by our opinion of April 3, 1970, in this cause . . ." The Board's decision in *Ex-Cell-O*, however, is manifestly tantamount to such a "supplementary

1. Counsel for the Board similarly directed the Court's attention to *Ex-Cell-O*, by letter dated September 2, 1970 appended hereto, noting that the decision in that case "bears directly on the issue of additional remedy requested by the Union herein . . ."

finding"; it carefully analyzes the decision of the Circuit Court and finds it to be "in error". The only basis upon which it cannot be considered the equivalent of a Board decision on remand here, it is submitted, is the Court of Appeals' refusal to accept the Board's position in *Ex-Cell-O*.

3. The Court of Appeals' order also magnifies the absence of any useful purpose in a remand of the present case to the Board. See Petition, pp. 8-9. Thus, the court emphasizes that its remand contemplates "further consideration by the Board in the light of our ruling that the Board had lawful authority to provide make-whole remedies", specifically disregarding the Board's clear determination in *Ex-Cell-O* that *under no circumstances* did it have such "authority". A remand, therefore, is merely an expensive and time-consuming futility which only postpones the necessary resolution by this Court of the important and far-reaching issues raised by the present case.

Respectfully submitted,

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APPENDIX

Order of the United States Court of Appeals for the District of Columbia Circuit Entered September 21, 1970.

Before: LEVENTHAL, ROBINSON, and MACKINNON, *Circuit Judges*, in Chambers.

ORDER.

Upon consideration of petition for rehearing, for tolling of time for stay of issuance of mandate, and for leave to file a second petition for rehearing and for enlargement of time to file intervenor's motion filed September 1, 1970, and the court being advised that a petition for certiorari has been filed by intervenor, it is

ORDERED that intervenor's aforesaid motions are denied. These motions seek to bring before the court the decision of the National Labor Relations Board in Ex-Cell-O Corp., 185 NLRB No. 20 made public August 29, 1970. That opinion is not the kind of supplementary finding contemplated by our opinion of April 3, 1970, in this cause, which remanded for further consideration by the Board in the light of our ruling that the Board had lawful authority to provide make-whole remedies. The Board's Ex-Cell-O decision in effect sets forth the Board's view of the legal question passed upon by this court, concerning the extent of its authority, and concludes that this court was in error. The question whether this court was in error has been presented to the Supreme Court. The court concludes that its opinion should not be recalled. There is no need for this

court to grant a rehearing in order to accomplish an enlargement of the record; the Board's recent Ex-Cell-O opinion is properly the subject of judicial notice.

Per Curiam.

Circuit Judge MacKinnon would grant the aforesaid motions.

Letter dated September 2, 1970 from Counsel for the National Labor Relations Board to the Clerk of the United States Court of Appeals for the District of Columbia Circuit.

Nathan J. Paulson, Esquire
Clerk, United States Court of Appeals for the District of Columbia Circuit
United States Court House
3rd & Constitution Avenue, N. W.
Washington, D. C.

Re: Nos. 23,209 and 23,321 respectively—*I. U. E.* v. *N. L. R. B.* and *N. L. R. B.* v. *Tiidee Products, Inc.* (C. A. D. C.) Board Case Nos. 9-CA-4618, 4639, 4710.

DEAR MR. PAULSON:

On August 29, 1970, the Board issued its decision in *Ex-Cell-O Corporation*, 185 NLRB No. 20. The briefs in the instant case have been filed with the Court for some months and, consequently, could not include the *Ex-Cell-O* decision.

Since the Board's Ex-Cell-O decision bears directly on the issue of additional remedy requested by the Union herein, we would appreciate your bringing the decision,

three copies of which are included herein, to the attention of the Court.

Thank you for your co-operation.

Very truly yours,

MARCEL MALLET-PREVOST,
Assistant General Counsel.

By /s/ EUGENE B. GRANOF,
Eugene B. Granof,
Attorney.

Enclosure
cc: Roy E. Brown, Esquire [with enclosure]
Melvin Warshaw, Esquire [with enclosure]

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In the Supreme Court of the United States

October Term, 1970

TIDEE PRODUCTS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

and

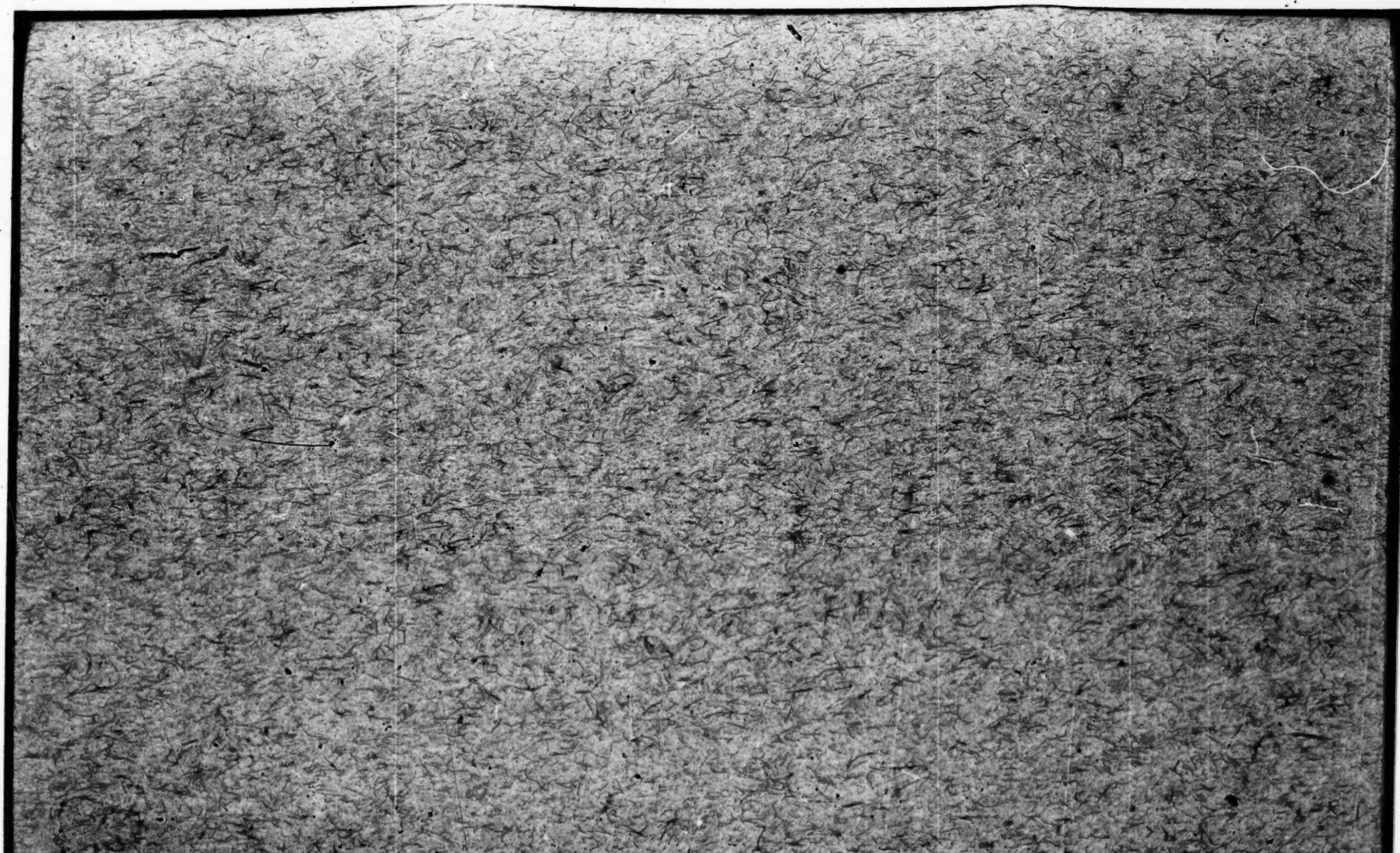
INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

ARNOLD ORDMAN,
General Counsel,
National Labor Relations Board,
Washington, D.C. 20570.



In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 654

THIDEE PRODUCTS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL–CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

---

1. The Board found that the Company committed numerous violations of the National Labor Relations Act, which included an unlawful refusal to bargain with the Union. The Trial Examiner recommended a conventional remedy for these violations, ordering the Company, *inter alia,* to cease and desist from its unlawful conduct and to bargain with the Union upon request (Pet. App. 34a–45a). He declined the Union's request for an order requiring the Company to make

404-946—70

the employees whole for wages and benefits which they might have obtained and to pay the Union the amount of dues and initiation fees which it might have received but for the Company's unlawful refusal to bargain, on the ground that use of these novel remedies should first be considered by the Board, which had the issue before it in other cases (Pet. App. 38a). The Board affirmed the remedy without comment (Pet. App. 2a–4a).

2. The court of appeals sustained the Board's unfair labor practice findings and enforced its order (Pet. App. 47a, 50a, 62a). However, the court, Judge MacKinnon dissenting, also concluded that the Board had not provided "a satisfactory justification" (Pet. App. 52a) for rejecting the Union's request for additional relief. It asserted that the "make-whole" remedy was within the Board's power under the Act and not precluded by *H. K. Porter Co., Inc.* v. *National Labor Relations Board*, 397 U.S. 99 (Pet. App. 56a–62a). It added that, "even if the Board declines to take the steps advocated by the Union, it may conclude that some other remedies will at least do something to advance the policies of the Act, and prevent the employer from having a free ride during the period of litigation" (Pet. App. 57a). The court accordingly remanded the case to the Board "for further consideration of the make-whole claim * * * with a directive to make supplementary findings in the event the Board determines on remand that it should not grant any make-whole relief, in whole or in part. If the

Board believes that alternative remedies, beyond those already granted are more appropriate, it should so state.[1] The assessment of these matters is for the Board" (Pet. App. 62a).

3. In these circumstances, the issue which the petition raises—whether the Board has power to compensate the employees for any benefits which they likely would have received had the employer bargained in good faith—is not ripe for review by this Court. It is true that the court of appeals has expressed the view that such a remedy is within the Board's power under the Act, while the Board has subsequently taken a contrary position in *Ex-Cell-O Corp.*, 185 NLRB No. 20 (Pet. App. 79a–120a), petition to review filed, *sub nom. Automobile Workers* v. *National Labor Relations Board*, No. 24577 (C.A.D.C.).[2] However, should the Board refuse the make-whole remedy in this case, its expressed reasons may satisfy the court of appeals. Alternatively, it may provide lesser, alternative relief which neither party appeals or which the court concludes is adequate in the circumstances here.

---

[1] The court explained:

> The scope of the Board's consideration on remand, if it is deemed that the Union's proposal goes too far, would include consideration of such lesser, alternative remedies as an award to the Union for excess organization costs caused by the Company's behavior, or for the costs of having to litigate a frivolous case, or for a combination of these. [Pet. App. 62a, n. 15.]

[2] Petitioner has filed a motion for leave to file a second petition for rehearing before the court of appeals in light of the Board's decision in *Ex-Cell-O*.

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
National Labor Relations Board.

OCTOBER 1970.

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Supreme Court of the United States

OCTOBER TERM, 1970

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THIDEE PRODUCTS, INC., *Petitioner,*

and

NATIONAL LABOR RELATIONS BOARD

v.

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, IN SUPPORT

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INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, IN SUPPORT

Respondent, International Union of Electrical, Radio and Machine Workers, AFL-CIO, joins petitioner in praying that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on May 18, 1970.

OPINIONS BELOW

The opinions in the court below are reported at 426 F.2d 1243 and printed in Appendix B to the petition, pp. 46a-69a. The decision and order of the National Labor Relations Board is reported at 174 NLRB No. 103 and is printed in Appendix B to the petition, pp. 2a-45a.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1970 (App. B, p. 70a).[1] Rehearing was denied on July 10, 1970 (App. B, p. 72a). The motion for leave to file a second petition for rehearing was denied on September 21, 1970 (Supplement to Petition for a Writ of Certiorari, p. 9). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Board has the power to order an employer to make whole either employees or their union, or both, for losses suffered as the result of the employer's conceded refusal to bargain collectively after the union was certified in a Board conducted election, where the Board found that the employer engaged in this and numerous other flagrant unfair practices because of an attitude of hostility to the very basic purposes of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (64 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq*) are printed in Appendix A to the petition. The Board's power to remedy unfair labor practices is granted by the following language in Section 10(c):

> "If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then

[1] "App. B" refers to Appendix B to the petition for a writ of certiorari.

the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act."

STATEMENT OF THE CASE

The petitioner, Tiidee Products, Inc., hereinafter called the Employer, is an Ohio corporation engaged in the manufacture of metal and plastics parts for mobile homes and travel trailers, with its plant and principal place of business in Dayton, Ohio (App. B, p. 6a). The respondent, International Union of Electrical, Radio and Machine Workers, AFL-CIO, hereinafter called the Union, made an unsuccessful attempt to organize the plant in 1964, which resulted in the filing of unfair labor practice charges and the issuance of a complaint by a General Counsel (App. B, p. 32a, fn. 27). The employees remained unorganized until July 1967, when the Union engaged in a successful organizational campaign and won an election conducted by the National Labor Relations Board on September 14, 1967, by a vote of 19 for the Union, 6 against and 3 challenged ballots (App. B, p. 8a). Certification of the Union issued on November 8, 1967 (G.C.Ex. 1(11), App. 518).[2]

In the usual proceedings on charge, complaint, hearing and order of the Board, followed by review and enforcement proceedings in the United States Court of Appeals for the District of Columbia Circuit, the Board found, and the court of appeals upheld all of

[2] "App." not followed by A, B, or C refers to the printed appendix in the court below.

its findings (App. B. pp. 46a-50a), that the Employer engaged in the following unfair labor practices:

From the outset of the organizing drive the Employer's president, Hollander, openly expressed to employees his determination never to have a union in his plant, threatening that "if they got in, he would close the doors" (App. B, pp. 13a-14a, 17a-19a, 29a, 35a). President Hollander and other supervisors unlawfully interrogated employees to determine the identity of union adherents and the extent of union activity among employees (App. B, pp. 13a-14a, 16a-18a, 29a, 30a, 35a) and sought to induce employees to act as informers concerning the union activities of fellow employees (App. B, pp. 13a-14a, 17a-18a, 30a-31a, 35a). Under employer aegis employees were polled by a supervisory employee who asked each employee to sign a petition with a yes or no after his name indicating whether or not he or she wanted an election to determine if a union should be chosen as his or her representative (App. B, pp. 15a-17a, 30a, 35a).

Following the certification of the Union the Employer not only refused even to meet with the Union (App. B, pp. 9a, 11a-12a, 36a) or to furnish it requested information as to the employees' existing wages and frringe benefits (App. B, pp. 9a, 12a, 36a) but also engaged in a campaign of eliminating union supporters from the plant by discharging two and laying off others solely because the Union won the election (App. B, pp. 19a-26a, 31a-34a, 35a). The Employer in retaliation against employees for selecting the Union, also arbitrarily increased production quotas of employees, thereby discriminating against them in order to discourage membership in the Union (App. B, pp. 25a, 32a, 35a-36a).

While the Employer purported at the time it refused the Union's initial request for bargaining to base its refusal on its desire to litigate the validity of the certification of the Union (App. B, pp. 15a-16a), both the Board (App. B, pp. 10a-11a) and the Court (App. b, p. 51) found that the Company's objections to the election were "patently frivolous and violated the express terms of the Agreement for Consent Election, entered into with the Union only thirteen days before the election, to abide by the decision of the regional director" (App. B, pp. 51a-52a). Neither before the Board nor in the court did the Company ever give "a hint of support or explanation for its claim that the regional director acted 'arbitrarily and capriciously'" (App. B, p. 52a). The Board found that the Employer's refusal to bargain pending litigation evidenced that the "Employer is seeking to avoid the obligations imposed by statute" (App. B, p. 12a), "evinces a complete rejection of the collective bargaining principle" (App. B, p. 37a) and "manifested an attitude of hostility directed toward the very basic purposes of the Act." (App. B, p. 39a).

In the court below the Employer made no effort in either its brief or oral argument to justify its refusal and indeed conceded both its "clear antiunion animus" from the "very beginning" of the organizational drive and its unlawful refusal to bargain collectively (App. B, pp. 46a-47a, cf. Pet. p. 3, fn. 1). The court characterized the position of the Company as "palpably without merit with respect to its refusal to bargain" (App. B, p. 54a), as "a clear and flagrant violation of the law" (App. B, p. 51a), "a brazen refusal to bargain, in violation of solemn obligations" (App. B, p. 53a), "a manifestly unjustifiable refusal to bargain" and "abuses like those before us" (App. B, p. 56a).

The Union, at the hearing before the Trial Examiner (App. B, pp. 37a-38a), in its exceptions to the Trial Examiner's decision and in the court below (App. B, pp. 47a, 52a, 57a, 63a-64a) sought an order requiring the Employer to remedy its refusal to bargain by making whole the employees and the Union for losses suffered as a result of such refusal (App. B, pp. 37a-38a, 57a, 59a-60a, 62a, fn. 15). The Trial Examiner "allowed the Union to develop fully in the record all evidence necessary to sustain its position in this issue" but declined to grant the requested remedy because it involved "both legal and policy questions which should be initially considered by the Board" (App. B, p. 38a). Accordingly the Trial Examiner recommended only the conventional prospective type order respecting the refusal to bargain, namely to cease and desist from refusing to bargain and upon request bargain collectively with the Union (App. B, pp. 39a-41a).

The Board in its short decision in which it adopted the findings, conclusions and recommendations of the Trial Examiner (App. B, pp. 2a-4a), made no mention of the fact that the Union sought any additional remedy.

In a carefully reasoned opinion the court of appeals held that the purely prospective type of order, "assuming" its "general validity", in a case of "brazen refusal to bargain, in violation of solemn obligations", "operates in a real sense so as to be counterproductive, and actually to reward an employer's refusal to bargain during the critical period following a union's organization of his plant" (App. B, p. 53a). The court held that a prospective-only order did not further labor policy because it enabled an employer to reap two fold benefits from his refusal to bargain: during the period before the enforcement of the Board's order the em-

ployer get what he considers the economic benefit of the refusal to bargain (App. B, p. 53a); when the employer is ordered to bargain with the union some years later, "the employer may reap a second benefit from his original refusal to comply with the law: he may continue to enjoy lower labor expenses after the order to bargain either because the union is gone or because it is too weak to bargain effectively" (App. B, p. 54a).

The court below detailed the injuries imposed by a purely prospective type order on employees, the union, other employers who bargain in good faith and suffer an economic disadvantage (App. B, pp. 56a, 57a-58a), the Board and the courts whose administrative and judicial resources are drained and diverted by encouraging "frivolous litigation" (App. B, pp. 54a-55a).

Analyzing pertinent statutory language and precedents in this and other courts, the court below held that the Board had the power to order a make-whole remedy for the refusal to bargain in this case (App. B, pp. 56a-62a). The court below found nothing in this Court's decision in *H. K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970) which impinged on the power of the Board to give the make-whole remedy which the court ordered the Board to consider. In this respect the court below stated (App. B, p. 61a):

> "We in no way suggest either that the Board can compel agreement or that the make-whole remedy is appropriate under circumstances in which the parties would have been unable to reach agreement by themselves. Quite the contrary, we have specifically limited the scope of our remand first, to consideration of past damages, not to compulsion of a future contract term, and second, to relate to damages based upon a determination of what the parties themselves would have agreed to if they had

engaged in the kind of bargaining process required by the Act. It is not within the scope of our remand for the Board to measure the amount of damages by reference to any contract term which could have been brought about only through a mandate to the employer not merely to engage in the process of collective bargaining but also to agree on a contract provision."

The court below accordingly enforced in full the order entered by the Board and at the same time remanded the Union's request for additional relief to the Board for further proceedings consistent with the court's opinion (App. B, pp. 62a, 70a). Judge MacKinnon concurred in the enforcement of the Board's order but dissented from the remand because he read this Court's decision in *H. K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970) as foreclosing the issue of the Board's power to grant the requested make-whole remedy (App. B, pp. 63a-69a).

REASONS FOR GRANTING THE WRIT

In our view, the decision of the court below is in every respect correct and, if certiorari is granted, we will seek an affirmance on the precise grounds set forth in the opinion below. We join in urging the grant of a writ of certiorari only because the National Labor Relations Board, in a three to two decision in *Ex-Cell-O Corp.*, 185 NLRB No. 20 (decision and order of the Board printed in full in Appendix C to the petition, pp. 79a-120a) issued on August 29, 1970, subsequent to the decision and judgment below, and in express disagreement with the holding of the court below in this case, held that the Board does not have the power which the court below held that the Board had and which the court had directed the Board to exercise on the remand of this case.

1. The Decision Below Presents a Question of Law of Great Importance in the Administration of the National Labor Relations Act, Which Should Be Decided by This Court

All the members of the National Labor Relations Board, including its present chairman, as well as the predecessor chairman of the Board, are agreed that if the Board does not have the power to grant a make-whole remedy, the Board lacks any effective means of enforcing Section 8(a)(5) of the Act. In the *Ex-Cell-O* decision, Chairman Miller, joining with Board Members Fanning and Jenkins, who constitute a majority of the present Board, stated (App. C, p. 83a):

> "We have given most serious consideration to the Trial Examiner's recommended financial reparations Order, and are in complete agreement with his finding that current remedies of the Board designed to cure violations of Section 8(a)(5) are inadequate. A mere affirmative order that an employer bargain upon request does not eradicate the effects of an unlawful delay of 2 or more years in the fulfillment of a statutory bargaining obligation. It does not put the employees in the position of bargaining strength they would have enjoyed if their employer had immediately recognized and bargained with their chosen representative. It does not dissolve the inevitable employee frustration or protect the Union from a loss of employee support attributable to such delay. The inadequacy of the remedy is all the more egregious where, as in the recent *N.L.R.B.* v. *Tiidee Products, Inc.*, case, the court found that the employer had raised 'frivolous' issues in order to postpone or avoid its lawful obligation to bargain." (Footnote omitted.)

The dissenting two members of the Board, predecessor Chairman McCulloch and Board Member Brown, dissenting in *Ex-Cell-O*, in urging that the Board did have the power to give a make-whole remedy which the

majority recognized was essential to make Section 8 (a)(5) effective, pointed to the widespread recognition in the courts, Congress and academic circles, of the inadequacy of the remedies which the Board has traditionally used. The dissent stated (App. C, pp. 104a-106a):

> "The present remedies for unlawful refusals to bargain often fall short, as in the present case, of adequately protecting the employees' right to bargain. Recent court decisions, congressional investigations, and scholarly studies have concluded that, in the present remedial framework, justice delayed is often justice denied.
>
> * * *
>
> "A study by Professor Philip Ross shows that a contract is signed in most situations where the employer honors its duty to bargain without delay, but that the chance of a contract being signed is cut in half if the case must go to court enforcement of a bargaining order. In the interim, of course, the employees are deprived of their rightful union representation and the opportunity to bargain over their terms and conditions of employment, while at the same time their employers may gain a monetary advantage over their competitors who have complied with their legal duty." (Footnotes omitted)

The dissent cited (App. C, p. 104a, fn. 45) the Cox Advisory Panel's report to the Senate Committee on Labor and Public Welfare[3] and testimony given at the hearings before the Special Subcommittee on Labor in 1968.[4] In addition it could have cited the Report of

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[3] Report pursuant to S. Res. 66 and S. Res. 141, 86th Cong., 2d Sess. 81 (1960).

[4] See testimony of Mozart G. Ratner during Hearings on Congressional Oversight of Administrative Agencies (NLRB) before the Subcommittee on Separation of Power of the Senate Committee in the Judiciary, 90th Cong., 2d Sess. Part 1, 1968, pp. 204, 214.

the Special Subcommittee on Labor, Committee on Education and Labor, House of Representatives, 90th Cong., 2d Sess. (Comm. Print. p. 2) which stated:

> "Employers who violate the law are encouraged to do so as the penalties come too late for effective enforcement, and in any event have little or no deterrent force."

Similarly the Subcommittee on NLRB of the House Committee on Education and Labor, 87th Cong., 1st Sess., Report on Administration of the LMRA by the NLRB (Comm. Print., p. 2, 1961) stated:

> "A partial reason for the caseload, and hence the delay in unfair labor practice cases, lies in the inadequate remedies of the Labor Board. Labor Board orders constitute in many situations no more than a 'slap on the wrist'. They are too little and too late. They constitute, in the words of one witness, 'a license fee for union busting'. The subcommittee recommends that the Labor Board reconsider the problem of 'remedies' with an eye to taking the profit out of unfair labor practices."

The caseload to which the above quoted subcommittee report refers has increased, with respect to refusal to bargain cases, three-fold since the date of the report. Indeed the history of the increase in refusal to bargain cases before the Board during the past 15 years is the most startling evidence of the ineffectiveness of present remedies. In the fiscal year 1955-1956 there were 838 charges under Section 8(a)(5). The number doubled by 1959-1960, trebled by 1962-1963, quadrupled by 1964-1965 and almost quintupled by 1968-1969 when the figure rose to 4,097. The increase in orders to employers to bargain was even more striking. The 23 in 1956-1957, doubled by 1958-1959, increased tenfold by 1964-

1965 and fifteen fold by 1966-1967, when 366 orders to employers to bargain were issued.[5]

[5] The following table is based on figures in the NLRB's Annual Reports. Page references in parenthesis are to the Annual Report issued by the NLRB for the year indicated in column 1, except that the figures without any parenthesis after them are taken from the NLRB 12th Annual Report for the fiscal year ended June 30, 1947:

Fiscal Year	No. of charges alleging 8(a)(5)	No. of Decisions finding 8(a)(5)	No. of Cases closed by collective bargaining begun by employer
1935-1936	405 (p. 34)		
1936-1937	1,291 (p. 19)		
1937-1938	2,576 (p. 28)		
1938-1939	1,776 (p. 31)		923
1939-1940	1,233 (p. 15)		881
1940-1941	1,593 (p. 25)		1,009 (p. 36)
1941-1942	1,550 (p. 77)		1,032 (p. 87)
1942-1943	756 (p. 85)		493 (p. 94)
1943-1944	465 (p. 79)		136
1944-1945	507 (p. 81)		116 (p. 85)
1945-1946	1,241 (p. 76)		176 (p. 81)
1946-1947	1,347 (p. 68)		273 (p. 88)
1947-1948	789 (p. 99)		173 (p. 106)
1948-1949	1,070 (p. 159)		228 (p. 166)
1949-1950	1,309 (p. 222)		236 (p. 229)
1950-1951	1,235 (p. 294)		261 (p. 295)
1951-1952	1,226 (p. 281)		197 (p. 282)
1952-1953	1,347 (p. 95)		247 (p. 96)
1953-1954	1,212 (p. 157)		230 (p. 158)
1954-1955	1,213 (p. 161)	65 (p. 5)	135 (p. 162)
1955-1956	838 (p. 165)	54 (p. 2)	117 (p. 166)
1956-1957	827 (p. 163)	23 (p. 3)	91 (p. 164)
1957-1958	1,039 (p. 145)	26 (p. 3)	39 (p. 146)
1958-1959	1,311 (p. 163)	55 (p. 3)	49 (p. 164)
1959-1960	1,753 (p. 180)	53 (p. 12)	269 (p. 181)
1960-1961	1,676 (p. 220)	67 (p. 17)	319 (p. 221)
1961-1962	2,294 (p. 262)	157 (p. 18)	432 (p. 263)
1962-1963	2,584 (p. 164)	165 (p. 21)	548 (p. 165)
1963-1964	3,088 (p. 170)	175 (p. 23)	986 (p. 173)
1964-1965	3,815 (p. 180)	226 (p. 21)	1,022 (p. 183)
1965-1966	3,811 (p. 186)	326 (p. 23)	1,103 (p. 190)
1966-1967	3,819 (p. 218)	366 (p. 15	1,282 (p. 222)
1967-1968	4,097 (p. 203)	332 (p. 15)	1,371 (p. 206)

The problem of the ineffectiveness of the prospective-type order in refusal to bargain cases has received extensive notice in studies of administration of the National Labor Relations Act[6] and the legal publications.[7] The court below has, in addition to its extensive statement in the instant case of the inadequacies of the Board's usual type of orders in collective bargaining cases (App. B, pp. 52a-57a), remanded in other cases because of such inadequacy. In *Food Store Employees Union Local 347* v. *NLRB*, 74 LRRM 2109 (D.C. Cir. May 4, 1970) the court below remanded for consideration of its remedy in the light of its decision in the instant case. Harvard Law School's Dean Derek Bok has indicated that continued scoffing at labor law because of the inadequacy of its remedies will cause the law to lose its "moral authority" and "the most serious consequences" will follow.[8]

Enforcement of the obligation to bargain collectively is crucial to the statutory scheme. *NLRB* v. *American*

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[6] Philip Ross, The Labor Law in Action: An Analysis of the Administrative Process under the Taft-Hartley Act, 1966 Labor Relations Yearbook 299, 302-303 (BNA); Philip Ross, The Government as a Source of Union Power (Brown University Press, 1965) p. 259.

[7] Stephen I. Schlossberg and John Silard, The Need for a Compensatory Remedy in Refusal-to-Bargain Cases, 14 Wayne L. Rev. 1059 (1968); Theodore J. St. Antoine, A Touchstone for Labor Board Remedies, 14 Wayne L. Rev. 1039 (1968); Note, An Assessment of the Proposed "Make-Whole" Remedy in Refusal-to-Bargain Cases, 67 Mich. L. Rev. 374, 378 (1968); Note, A Survey of Labor Remedies, 54 Va. L. Rev. 38, 67 (1968); Note, The Need for Creative Orders under Section 10(c) of the National Labor Relations Act, 112 U. Pa. L. Rev. 69, 83-88 (1963).

[8] Derek Bok, The Regulation of Campaign Tactics in Representation Elections under the National Labor Relations Act, 78 Harv. Law Rev. 38, 59 (1964).

National Insurance Co., 343 U.S. 395, 402 (1952). Indeed it underlies our entire national policy. *Boys Market, Inc.* v. *Clerk's Union*, 398 U.S. 235, 251 (1970).

While the majority of the National Labor Relations Board in the *Ex-Cell-O* case, suggested that the remedy be sought in Congress (App. C., p. 89a), we submit that in an issue of such critical importance this Court should first pass on the question so that it will be clear whether Congressional action is necessary. In other fields this Court has not been hesitant to take cases involving an issue as to whether a statute of Congress provided an effective remedy and has gone far to construe statutory language to prevent a Congressional policy from aborting for want of an effective remedy. In *Hanover Shoe Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 431, 494 (1968), fearing that treble-damage actions would be "substantially reduced in effectiveness", this Court construed statutory language requiring the plaintiff to have been "injured in his business or property" as satisfied even though the plaintiff passed on all the loss for otherwise "those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who could bring suit against them." Here, as the court below pointed out, we have injured employees whose loss coincides with the fruits of illegality retained by the employer (App. B, pp. 53a-54a). Similarly, in *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 624-625 (1966) this Court held "expected profits" could be recovered for the period during which the wrongdoer litigated.

2. The Difference in Interpretations Placed on Porter by Judges and Administrators Should Be Settled by This Court

The majority of the court below, we believe correctly, found nothing in this Court's decision in the *Porter*[9] case which suggested that a make-whole remedy was not within the Board's powers in a case such as the instant one (App. B, p. 61a). Judge MacKinnon, dissenting below, read *Porter* as precluding such a remedy (App. B, pp. 65a-66a, 68a). A majority of the Board members read *Porter* as Judge MacKinnon does (App. C, pp. 87a-88a). The minority of the Board read *Porter* as the majority of the court below does (App. C, pp. 109-110 and fn. 55).

That it is this Court's decision in *Porter* which has caused the difficulty, over the matter of the Board's power to issue a make-whole remedy in an initial refusal to bargain case appears to be confirmed by the fact that prior to *Porter* the Board had, at least on one occasion, granted such a make whole remedy. *Petrolane-Franklin Gas Service, Inc.*, 174 NLRB No. 88 (1969).[10]

This uncertainty as to the meaning of the *Porter* decision requires clarification which can only come authoritatively from this Court. The present case presents an excellent vehicle for such clarification.

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[9] *H. K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970).

[10] There the Board adopted the Trial Examiner's decision which as a remedy for an initial refusal to bargain, required the employer to put into effect retroactively pay and salary increases granted at other of the employer's plants.

3. The Interlocutory Character of the Order Should Not Bar Review at This Stage Because All Parties Are Agreed That Proceedings on Remand Prior to Decision by this Court Would Serve No Useful Purpose

At the time when the Union moved in the court below for a remand and the court granted the remand, neither the Union nor the court was aware that the Board would deem itself to be lacking in the statutory power to grant a make-whole remedy. The court below has thus ordered the Board to exercise a power which the Board disclaims.

It is theoretically possible for the Board to take the remand and proceed to devise a make-whole order on the assumption that it has the power to do so. However, devising a make-whole remedy involves the exercise of discretion in an area where a wide variety of possible solutions must be considered and resolved through administrative ingenuity of the highest order. The dissent in *Ex-Cell-O* suggests a few of the possibilities. (App. C, pp. 115a-118a).

The pursuit of the remand, prior to the time that this Court decides the Board's power, will saddle the parties with an order reflecting a dubious exercise of discretion because based on theoretical administration rather than genuine administration, if the power is ultimately held present, or result in useless delay and expense, if the power is ultimately held lacking.

This case, therefore falls within the rule that review of a nonfinal decree will be granted where "necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause". *American Construction Co. v. Jacksonville, T. & K.W. Co.*, 148 U.S. 372, 384 (1893). The petition for a writ of certiorari presents an important and clear cut issue of law that is

fundamental to the future course of the case. This Court has on occasion departed from its usual reluctance to review interlocutory matters where the issue, of such importance as to require review here, was one fundamental to the future conduct of the case. *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945); *Hanover Star Milling Co.* v. *Metcalf*, 240 U.S. 403, 408-409 (1916).

CONCLUSION

For the foregoing reasons it is urged that the petition for a writ of certiorari be granted.

Respectfully submitted,

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October 5, 1970

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 654

TIDEE PRODUCTS, INC., *Petitioner,*

and

NATIONAL LABOR RELATIONS BOARD

v.

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR RESPONDENT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, IN SUPPORT

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REPLY BRIEF FOR RESPONDENT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, IN SUPPORT

The Memorandum For The National Labor Relations Board In Opposition, in arguing that the case is not ripe for review (Mem. Opp. p. 3), proceeds on the assumption that the Board, on the remand, will not exercise the make-whole power but in some other manner may satisfy the remand. This position

of the Board establishes that the case is ripe for review.

1. Despite the Board's attempt to minimize the ruling by the court below on the Board's power by characterizing it as merely an expression of views (Mem. Opp. p. 3), the court below did squarely rule that the Board has the power to grant a make-whole remedy (App. B, pp. 52a-62a).

The Board in its Memorandum in Opposition, quotes out of context, the clause from the opinion in the court below, "even if the Board declines to take the steps advocated by the Union" (Mem. Opp. p. 2). The "steps advocated by the Union", to which the court below referred, were those stated in the immediately preceding sentences which read as follows (App. B, p. 57a):

> "There may be difficulties in one of the proposals offered by the Union in this case; that the Company be ordered to pay dues, for the pay period 'lost' to the employees by virtue of the Company's violation, to the union they selected as their agent. We are in no position to gainsay the possibility that an agency might reject the proposal for reasons of sound administrative policy. And any such proposals would have to be shaped to take into account legal considerations.[10] . . ."

> "[10] Since the dues and initiation fees would have come from the employees' pockets and not from the Company, any assessment of these charges against the Company would have to be subtracted from back pay awards. This would avoid legal problems of a Board order awarding more than back pay."

The main make-whole remedy sought by the Union was the restitution of losses in wages and fringe benefits suffered by employees (App. B, pp. 63a-64a).

While the court below left the Board free on remand also to consider alternate remedies, the court made it clear that the Board was to conduct the remand on the basis that the Board had the make-whole power. Nothing the court said suggests any alternatives to an exercise by the Board of its make-whole powers. The court below specified that "we have specifically limited the scope of our remand first, to consideration of past damages * * * and second, to relate to damages based on a determination of what the parties themselves would have agreed to" (App. B, p. 61a).

The opinion of the court below thus makes it the law of the case on remand that the Board must accept, for further proceedings in this case, that it has the power to grant the make-whole remedy and on that basis determine which, if any, type of make-whole remedy, is appropriate to the facts of this case.

The Board in its decision in *Ex-Cell-O Corp.*, 185 NLRB No. 20 (1970) ruled that any financial reparation order, based on losses suffered during the period of litigation, was punitive and hence beyond the power of the Board (App. C, p. 85a). With specific reference to the decision below, the Board, in its *Ex-Cell-O* decision, stated that such an imposition on an employer was punitive even if all his objections to the certification were frivolous (App. C, p. 86a). Citing the decision of the court below in this case, the Board stated its disagreement therewith (App. C, p. 86a).

The Memorandum of the Board in Opposition indicates that the Board will attempt to work out remedies other than those barred by its *Ex-Cell-O* decision (Mem. Opp. p. 3). Proceedings on remand so limited

would not fulfill the remand. Only confusion and delay will ensue if the question here presented for decision by this Court is not decided now but postponed until further proceedings are conducted on the basis indicated in the Board's Memorandum in Opposition.

2. The Board suggests that the case is not ripe for review because on remand the Board might express reasons for refusing the make-whole remedy which may "satisfy the court of appeals" (Mem. Opp. p. 3). The Board could have filed a petition for rehearing if it believed that it could advance reasons which would convince the court of appeals that the Board had no power to grant a make-whole remedy. Having lost on this issue if the Board accepts the remand, the Board must follow the law of the case as laid down by the court of appeals and proceed to consider a make-whole remedy on the basis that the Board has the power to grant such a remedy. The advancing by the Board of this argument to this Court indicates that the Board has no intention of proceeding on the basis that it has power to grant a make-whole remedy. With the Board taking this position pursuit of the remand would be useless.

3. The Board suggests that the case is not ripe for review because on remand, instead of granting a make-whole remedy, the Board might give "alternative relief which neither party appeals or which the court concludes is adequate in the circumstances here" (Mem. Opp. p. 3). This suggestion further demonstrates that the case is ripe for review.

From the outset of this case the Union has sought a make-whole remedy. The court of appeals, not only

agreed with the Union that the Board had the power to grant such a remedy, but in addition made it clear that it believed that such a remedy was required (App. B, pp. 53a-60a). It also agreed with the Union's suggestion that principles of administrative law warranted a remand so the Board might have an initial try at shaping the make-whole remedy (App. B, p. 62a). At the time the Union advanced this suggestion, and the court below acquiesced in it, the Board had not disclaimed any make-whole powers.

In view of the long effort of the Union to secure a make-whole remedy, it borders on frivolous to urge seriously here that, on a second chance at remedy, the Board might come up with something less and different that will satisfy the Union.

Satisfaction of the court of appeals is irrelevant, because if the court of appeals is satisfied with something less than a make-whole remedy, the Union will be again seeking review by this Court of the same question as is now presented, without the intervening proceedings before the Board or the court below having advanced the cause in any regard.

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October 9, 1970

SUPREME COURT, U. S.

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IN THE

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OCTOBER TERM, 1970.

No. 654

TIIDEE PRODUCTS, INC.,

Petitioner,

and

NATIONAL LABOR RELATIONS BOARD,

vs.

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Respondent.

RESPONSE TO MEMORANDUM OF THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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The International Union of Electrical, Radio and Machine Workers, AFL-CIO (hereafter referred to as the "Respondent Union"), which has joined in the instant Petition, has submitted a Reply Brief which cogently argues that this case is ripe for review. In addition to the considerations described in the Reply Brief, we believe that the following reasons also demonstrate that the position of the National Labor Relations Board in its Memorandum In Opposition is in error.

1. The Memorandum In Opposition argues that upon

remand, "should the Board refuse the make-whole remedy in this case, its expressed reasons may satisfy the court of appeals." Mem. Opp. p. 3. Initially, this contention is irrelevant for, as the Respondent Union observes, the result would merely be a further effort by the Union, without the benefit of any intervening illuminating litigation, to obtain review by this Court. Moreover, it taxes the imagination to conceive of how the Board, at this late date, can now express reasons that would be satisfactory to the court below. The Board has already passed on this case once and declined to grant a make-whole remedy. App. B to Pet., pp. 2a-4a, 37a-39a. It was unsuccessful, however, in convincing the court of appeals that the reasons for this decision were persuasive.

Subsequently, in its decision in *Ex-Cell-O Corporation*, 185 NLRB No. 20, *appeal docketed sub. nom., Automobile Workers* v. *N. L. R. B., No. 24577*, D. C. Cir., August 26, 1970 (App. C to Pet.), the Board, after over three years of deliberation, "seriously explor[ed]", in the words of its Chairman, "the legislative history of the Act, the law itself, and available judicial precedent bearing upon the matter . . . the question was not an easy one . . . both the majority and minority presented substantial legal and practical arguments in favor of their respective positions." Board Chairman Edward B. Miller in a speech entitled "First Impressions" delivered to the Ninth Annual Corporate Counsel Institute of Northwestern University Law School, October 8, 1970, reprinted at 196 Daily Labor Reports D-1, D-4 (BNA, October 8, 1970). Yet the Board majority's "substantial legal and practical arguments" for its conclusion that there were "insuperable legal and practical obstacles" to imposition of a make-whole remedy (*Ibid.*) did not constitute, according to the court of appeals, "the kind of supplementary finding contemplated by our opinion of April 3, 1970, in this cause". Order of the Court of Appeals, September 21, 1970 (App. to Supp. to Pet.)

2. The Memorandum In Opposition also contends that, upon remand, the Board could "provide lesser, alternative relief which neither party appeals or which the court concludes is adequate in the circumstances here". Mem. Opp. p. 3. This argument disregards the position of the Respondent Union that it will accept nothing less than a full make-whole remedy. At some point in time, therefore, a resolution by this Court will be needed on the conflict which exists between the Board and the court of appeals as to the propriety of such a remedy. It is this critical issue—apart from the availability of a mutually-unsatisfactory alternative remedy—which requires resolution by this Court. As an observer in the *Wall Street Journal* recently commented, "[e]xperts believe it will be up to the [Supreme] Court to define the extent of NLRB powers and the remedies it can ultimately accord workers under the National Labor Relations Act." Carlson, *Seeking Speedier Justice at the NLRB*, Wall Street Journal, September 25, 1970. We concur in the Respondent Union's view that "[t]he present case presents an excellent vehicle for such clarification." Br. in Supp. p. 15.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

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November 17, 1970

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IN THE

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OCTOBER TERM, 1970

No. 654

TIDEE PRODUCTS, INC., *Petitioner*

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On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

On September 4, 1970, Petitioner filed with this Court its Petition for Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on April 3 and May 18, 1970, respectively. A supplement to the Petition was filed with this Court on September 28, 1970. Respondent

Union has also filed with the Court a brief in support of the Petition.

Subsequently, in *Local 153, International Ladies' Garment Workers' Union, AFL-CIO, et al.* v. *National Labor Relations Board, et al.*, —— U.S. App. D.C. ——, —— F.2d —— (D.C. Cir. Nos. 23,457, 23,562, and 23,653, decided Nov. 9, 1970), a copy of which is attached hereto, the District of Columbia Court of Appeals has deferred action on an application for a make-whole remedy pending action by the Court herein. The court explained:

> We grant the Board's application for enforcement now of its order as it stands. We reserve to the parties the right to petition this court for reconsideration of the issue of additional remedies after disposition by the Supreme Court of *Int. U. of Elec., Radio & Machine Wkrs.* v. *N.L.R.B.* [*Tiidee Products*], —— U.S. App. D.C. ——, 426 F.2d 1243 (1970), and disposition by this Court of *Int. U., U.A.W.* v. *N.L.R.B.* [*Ex-Cell-O Corp.*], NLRB Case 25 —— CA —— 2377, D.C. Cir. No. 24,577. [Slip Opinion, p. 3.]

In conclusion, the court stated:

> Relying on the finding of the trial examiner, adopted by the Board, that "the nature of the violations strikes at the heart of the Act and calls for a broad order," the union maintains that a more effective prophylactic remedy is needed. The *Tiidee Products* and *Ex-Cell-O Corporation* cases present this very difficult problem of effective remedies for unfair labor practices, particularly in connection with union organizing drives. *We have decided to abide the disposition of those cases before resolving the union's claim for additional remedies.* [Emphasis added.] [Slip Opinion, p. 5]

The court's opinion suggests, as the parties had urged, that guidance by the Court in this important area would be helpful.

WHEREFORE, Petitioner prays that the Court grant its Petition for Writ of Certiorari herein.

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November 17, 1970

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,457

LOCAL 153, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

No. 23,562

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

MARIE PHILLIPS, INC., *Respondent*

No. 23,653

MARIE PHILLIPS, INC., *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

Petitions for Review and Application for Enforcement of an Order of the National Labor Relations Board

Decided November 9, 1970.

Mr. Max Zimny for petitioner in No. 23,457. *Messrs. Jerry D. Anker* and *Morris P. Glushien* also entered appearances for petitioner in No. 23,457.

Mr. Jerome Weinstein, of the bar of the Supreme Court of Michigan, *pro hac vice*, by special leave of court, for

petitioner in No. 23,562 and respondent in Nos. 23,457 and 23,653. *Messrs. Arnold Ordman*, General Counsel, *Dominick L. Manoli*, Associate General Counsel, *Marcel Mallet-Prevost*, Assistant General Counsel, and *John I. Taylor, Jr.* and *J. L. A. de Passalacqua*, Attorneys, National Labor Relations Board, were on the brief for petitioner in No. 23,562 and respondent in Nos. 23,457 and 23,653.

Messrs. Joseph S. Sudarsky and *Harold L. Luxemburg* for petitioner in No. 23,653 and respondent in No. 23,562.

Before WRIGHT, McGOWAN and MACKINNON, *Circuit Judges*.

PER CURIAM: These consolidated appeals are before the court on petitions for review filed by Local 153, International Ladies' Garment Workers' Union, and Marie Phillips, Inc. to review an order of the National Labor Relations Board issued against the company on September 5, 1969, and reported at 178 NLRB No. 53. The Board has filed an application for enforcement of that order. The questions presented are (1) whether substantial evidence on the record as a whole supports the Board's finding that the company violated Section 8(a)(1), (3) and (5) of the Act[1]; (2) whether substantial evidence on the record as a whole supports the Board's findings that the union represented a majority of the production and maintenance employees on January 19, 1967, and that the company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the union on and after that date; and (3) whether the Board abused its powers in refusing to grant the union's request for further remedial relief. We grant the Board's application for enforcement now of its order as it stands. We reserve to the parties the right to petition this court for reconsideration of the issue of additional remedies after

[1] 29 U.S.C. § 158(a)(1), (3) and (5) (1964).

disposition by the Supreme Court of *Int. U. of Elec., Radio & Machine Wkrs.* v. *N.L.R.B.* [*Tiidee Products*], —— U.S. App. D.C. ——, 426 F.2d 1243 (1970), and disposition by this Court of *Int. U., U.A.W.* v. *N.L.R.B.* [*Ex-Cell-O Corp.*], NLRB Case 25—CA—2377, D.C. Cir. No. 24,577.

The evidence depicts a classic organizing campaign by the union and a classic response by the company, including promises and threats by the company against signing cards designating the union as bargaining representative, unfair labor practice discharges, and refusal to reinstate strikers in their jobs. The Board adopted the trial examiner's findings that the company had shown a "complete rejection of the collective bargaining principle" and a "determination to destroy the Union's majority." Under the circumstances, the Board found that the company's conduct violated Section 8(a)(1), (3) and (5) of the Act. The Board also found that a valid majority of the employees in an appropriate bargaining unit had signed up with the union. The Board concluded that the company's "unfair labor practices were so pervasive and coercive as to prevent recourse to an election to determine the question concerning representation raised by the Union's demand for recognition and bargaining. Accordingly, to remedy these unfair labor practices and to effectuate the employees' freely made choice for union representation as manifested by the signed authorization cards of a majority of employees in the unit, our order shall include provisions requiring [the company] upon request to recognize and bargain with the Union as the exclusive representative of its employees."

We have carefully considered the record as a whole. We hold that the Board's findings clearly pass the substantial evidence test. The company's primary attack is on the Board's designation of the union as bargaining representative of the employees. It challenges the reliability

of cards obtained under a promise of nondisclosure except to the Board, the admission in evidence of testimony of the solicitors of the cards, and the exclusion of evidence of employees' subjective motivations in signing the cards. This challenge must fail in the light of *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969). There the Supreme Court not only upheld the reliability of cards obtained on the promise of confidentiality, but also rejected a claim that one who witnessed a signature is not competent to testify as to its authenticity. Moreover, also in *Gissel* the Court "reject[ed] any rule that requires a probe of an employee's subjective motivations as involving an endless and unreliable inquiry." 395 U.S. at 608. *Accord, Int. U., U.A.W.* v. *N.L.R.B.* [*Preston Products*], 129 U.S. App. D.C. 196, 203, 392 F.2d 801, 809 (1967), *cert. denied*, 392 U.S. 906 (1968).

The company also challenges some 26 cards on the additional ground that persons signing them were induced to do so in the belief that a majority of the employees had already signed. The Board found that "a showing, without more, of a misrepresentation as to the number of others who have signed union cards is insufficient to invalidate a clear and unequivocal designation card signed by an employee." This finding is supported by the decisions of this court. "Such puffing [that a majority of the workers had already signed union authorization cards] does not vitiate the cards unless the comments were a means of coercing employees to sign cards out of a fear of majority reprisal." *Amalgamated Clothing Workers of America* v. *N.L.R.B.* [*Sagamore Shirt Co.*], 124 U.S. App. D.C. 365, 375, 365 F.2d 898, 908 (1966).

The remedies ordered by the Board require the company to cease and desist from the unfair labor practices found and from in any manner interfering with, restraining or coercing employees in the exercise of their protected rights. The Board's order also requires the com-

pany to reinstate the employee victims of the unfair labor practices to their former or substantially equal positions with their rights and privileges intact, to make the reinstated employees whole for any loss of earnings by reason of the company's discrimination against them, to post the appropriate notices, and to bargain with the union as the exclusive representative of the employees. Relying on the finding of the trial examiner, adopted by the Board, that "the nature of the violations strikes at the heart of the Act and calls for a broad order," the union maintains that a more effective prophylactic remedy is needed. The *Tiidee Products* and *Ex-Cell-O Corporation* cases present this very difficult problem of effective remedies for unfair labor practices, particularly in connection with union organizing drives. We have decided to abide the disposition of those cases before resolving the union's claim for additional remedies.

Enforced.

MacKinnon, *Circuit Judge*, concurring in part and dissenting in part: I concur in the court's *Per Curiam* opinion except I would at this time affirm the Board's order denying additional remedies requested by the Union. These requests were for a monetary remedy for losses allegedly incurred as a result of the Company's unfair labor practices and that the Company be required to recall and mail the Board's notice to employees, to grant the Union access to bulletin boards in the plant and to furnish the Union with the names and addresses of employees. With respect to these issues, I concur with the Board that a monetary remedy is not needed here to effectuate the policies of the Act, *United Steelworkers of America, AFL-CIO* v. *NLRB*, Nos. 23551 & 23709, decided July 10, 1970, slip op. 4, and that the other remedies are not appropriate or necessary to a case such as is here presented in which the Board characterized the conduct of the employer as not demonstrating "a pronounced

proclivity for violating the Act." *See J. P. Stevens & Co.* v. *NLRB*, 417 F.2d 533 (5th Cir. 1969), which demonstrates what the Board considers to be an appropriate case for such relief. Clearly, the action of the Board here was within its administrative competence and should be respected by this Court. *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 216 (1964); *J. P. Stevens & Co.* v. *NLRB*, *supra*, 417 F.2d at 537.